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THE PEOPLE OF THE STATE OF ILLINOIS
for Use of IDA SLAVIK, BERTHA DICUS
and ELMA DICUS, Conservatrices of
Estate of Louis Scherer, Incompetent,
Appellants,

TB.

UNITED STATES FIDELITY AND GUARANTY COMPANY and JOHN B. DICUS,
Appellees.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Henry Scherer, a resident of Chicago, Cook county, Illinois, died October 28, 1925, leaving him surviving three daughters, Emma, Bertha and Ida, and one son, Louis, who was mentally defective, as his only heirs at law and next of kin. He left a purported will naming the Central Trust Company, a corporation, executor.

A bill was filed in the Superior court to contest this will. A decree was entered setting aside the will and directing that the administration of the estate should be transferred to the Superior court. The three daughters, Emma, Bertha and Ida, were appointed by the Probate court conservatrices of the estate of their incompetent brother Louis. John G. Purkel was appointed guardian ad litem for Louis Scherer, and John B. Dicus, defendant, was duly appointed administrator of the estate of Henry Scherer. April 8, 1929, John B. Dicus filed his bond as such administrator, which was approved by the Superior court of Cook county.

April 29, 1929, an order was entered by the Superior court upon petition of the administrator directing the administrator to turn over to the sister conservatrices of Louis Scherer 41 shares of the stock of the Central Trust Company of Illinois, a bank and corporation, and 375 shares of the common stock of the Illinois Brick Company, a corporation. This same order provided that the administrator should retain real estate bonds and mortgages of par the value of \$62,000, estimated to be sufficient to pay claims

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UNITED STATES FEDERATY AND GUARANTY COMPANY and JOHN B. DICUS, Appelleds.

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incurred in the course of the administration of the estate.

This suit is on the bond of John B. Dicus, administrator, for damages averred to have been sustained on account of the failure of John B. Dicus to comply with said order of April 29,1929.

Defendants by their affidavit of merits filed December 7, 1935, averred that immediately upon the entry of the order of April 29, 1929, the administrator offered to deliver to plaintiffs the distributive share of Louis Scherer as provided for in the order, but plaintiffs requested the administrator to retain the Central Trust company stock so that he could exercise an option to purchase new stock, according to certain rights which had been given to stockholders thereof by the Central Trust Company; that on May 15, 1929, plaintiffs stated to defendant Dicus that the market price of the stock in the Brick company was low and requested him to hold it for a higher price and never thereafter requested or demanded delivery of the same.

The issues were submitted to a jury, which returned a verdict in favor of defendants, upon which the court, overruling motions of plaintiffs for a new trial and for judgment notwithstanding the verdict, entered judgment upon the said verdict as returned. From that judgment plaintiffs appeal.

Plaintings contend that under the evidence they were, as a matter of law, entitled to recover; that a motion made by them at the close of all the evidence for a directed verdict in their favor and a similar motion that judgment be entered in their favor, notwithstanding the verdict, should have been granted.

The material facts, as we view them, are practically undisputed with the exception that testimony of defendant to conversations with plaintiffs Emma Dicus and Ida Slavik after the entry of the order of April 29, 1929, in which he says he offered to deliver the

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The uncontradicted evidence tends to show that defendant John B. Dicus is a dentist practicing his profession in Chicago: that Emma Dicus, one of the daughters and heirs at law of Henry Scherer, is married to W. O. Dieus, a brother of defendant John B. Dicus: that John B. Dicus is married to Bertha Dicus, a sister of Emma and Ida and daughter of Henry Scherer. Henry Scherer died October 28, 1925, leaving a substantial estate. Pending the contest of his will, the Central Trust Company was appointed administrator and after the alleged will was decreed to be invalid about April 8, 1929, John B. Dicus was appointed administrator of the estate. The assets of the estate received by John B. Dicus included 167 shares of the stock of the Central Trust Company, which was represented by five certificates for 25 shares each and one certificate for 42 shares. These certificates were made out in the name of the Central Trust Company of Illinois as administrator of the estate.

Defendant John B. Dicus also received 1500 shares of the common stock of the Illinois Brick Company. Some of the shares were issued in the name of Henry Scherer, others which had been issued as stock dividends were in the name of the Central Trust Company of Illinois. This stock was received by defendant April 12, 1929.

The order of April 29 in the Superior court was entered upon the petition of defendant John B. Dicus as administrator, but the three sisters joined in the petition and, as a matter of fact, O. K.'d the order. It was also O. K.'d by the guardian ad litem of

stocks to the second constant denies by the three objects to the jury ith a verdict for defendant. All the circumstances in evidence correspondence, we tainly the testing of defendants as to these convergences.

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Louis Scherer, the incompetent. On this date the Central Trust company stock was worth on the market about \$600 a share. May 27th of the same year it sold for \$697, a share. In the meantime came the depression, and at the time of the trial the Bank stock was without value. The Illinois Brick company stock at the time of the entry of the order was worth from \$32 to \$33,50 a share. Francis M.

Lowes was attorney for the estate, and he prepared the petition of the administrator praying the entry of the order of April 29.

Weither the Central Trust Company of Illinois stock nor the Brick company stock was ever delivered to the conservatrices as provided for in this order. As a matter of fact, John B. Dicus as administrator held the stock until January 25, 1935, at which time he delivered it to Walker Butler, who had been appointed his successor as administrator of the estate.

As already stated, John B. Dicus testified that he offered to deliver the stock to the conservatrices and that they requested him to hold it. They denied this, but they do not testify that they or any one of them at any time made any demand on him that he turn the stock over to them, nor do they testify to any facts tending to show any improper use of the stock for the personal benefit of the administrator or any fraud by him in connection therewith. No selfish or improper motive for witholding the stock appears from the evidence. Bertha Dicus, one of the parties plaintiff, was joined in this suit against her husband without her knowledge or consent, and she has apparently taken no part in it. The evidence shows that at the time of the entry of the order of April 29, and for a long time thereafter the family was entirely harmonious with reference to matters connected with this estate. Each of the sisters was taking care of their incompetent brother in turns of eight weeks. Emma Dicus talked with defendant administrator about an allowance of \$50 a week being made to her for taking care of the

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The defendant administrator told her that he would take the matter up with the attorney for the estate and the other interested parties and see if the allowance might not be made. It was at this time, he says, that he told her he was ready to deliver the stock to each of them. Ida Slavik owed the estate some \$7000 and the matter of taking care of this obligation was taken up. and he told her he thought an arrangement could be made to take care of that: he says he also told Ida at that time that he was ready to deliver the stock, but that Ida suggested to him that there were rumors of stock rights to be issued in connection with the Central Trust Company of Illinois stock, and that if the money of Louis was used up he would not be able to take advantage of these rights: that she thought the stock should remain in the estate. As a matter of fact, on June 11, 1929, the administrator turned in the old certificates and secured new ones therefor, Emma and Ida both went to Fond du Lac where they remained during June, July and August of that year. While they were there a petition was prepared by Mr. Lowes in behalf of Emma Dicus, Bertha Dicus, Ida Slavik and Louis Scherer by John G. E. Puerkel as guardian ad litem and John B. Dicus as administrator. This petition recited the material facts with reference to the estate and stated that on July 12, 1929, a special meeting of the stockholders of the Central Trust Company had voted to issue rights for each share of stock held; that for each seven rights so held the holder was entitled to buy one share of stock at \$350 a share, for which warrants were issued on July 12; that the right to purchase must be exercised before 3 o'clock p. m. July 31, 1929; that each of them believed it would be advantageous to the estate of Henry Scherer to purchase the 24 additional shares to which the estate was entitled under these rights, and pay for them out of the money then in the hands of the administrator: that he had sufficient funds to purchase such shares. The petition

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prayed that an order authorizing the administrator so to do be entered. This petition was forwarded to Emma Dicus and Ida Slavik at Fond du Lac and was subscribed by them there, and on July 29, 1929, the Superior Court or Cook county entered an order authorizing the administrator so to do. August 27, 1929, John B. Dicus as administrator presented a petition to the Superior court which recited that the complainants, individually and as conservators of Louis Scherer, consented to the granting of the prayer of the petition. The order authorized the administrator to sell the 191 shares of the Central Trust Company stock belonging to the estate for not less than \$690 a share: that complainants consented to this order is apparent from the fact that they duly filed in the Probate court of Cook county in the matter of the Estate of Louis Scherer a petition in which they state that as conservators of said estate they had consented to the order of the Superior court authorizing the sale of said stock and prayed that an order be entered approving and ratifying their consent theretofore given, This petition was verified by Ida Slavik, Emma Dicus and Bertha Dicus on September 3, 1929, and on that day the Probate court entered an order approving and confirming the action of the conservatrices in consenting to such sale.

The friendly relations which existed between the parties is illustrated by a letter by Emma Dicus dated July 29, 1929, at Fond du Lac, Wisconsin, in which she addresses defendant and his wife as "Dear John and Bertha" and gives them an urgent invitation to come to Fond du Lac where "we are alone and can have a Dicus reunion." The letter ends, "hove to all, Bye Bye. More later. Be sure to come, Lovingly, Emma."

How or when this cordial relationship ended the record does not disclose. We find difficulty in apprehending the theory upon which the plaintiffs undertake to maintain this suit. The

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statement of claim, amended many times, avers that the administrator breached the bond in failing and neglecting to turn over the stock or the value thereof on April 29, 1929. To their claim that defendants are liable as a matter of law they cite Housh y. People. 66 Ill. 178; Salemen v. People, 191 Ill. 290; McDonald v. People, 222 Ill. 325; and Haskins v. Martin, 103 Ill. App. 115, all of which are so clearly distinguishable as to make discussion of them unnecessary. The whole record here tends to show the defendant was at all times willing and able to deliver and that delivery was postponed for the convenience or at the request of the plaintiffs, or some of them. While the evidence is in conflict as to some of the conversations , in effect the verdict of the jury is that plaintiffs did request postponement and no person can, we think, reasonably draw any other inference from the testimony of the witnesses and all the facts and circumstances appearing in the evidence. Plaintiff's cite no cases and we do not believe a case can be found in the books where a party entirely willing and able to deliver under such an order, who postpones such delivery for the convenience and at the request of the parties who are to receive, has been held liable in an action for conversion or for negligence. Indeed, if there is negligence here, it is on the part of the conservatrices upon whom primarily rested the duty of taking the property of and caring for the estate of the incompetent brother. Not the administrator, but they were his keepers and guardians, and the duty was primarily upon them. Bond vs. Lockwood, 33 Ill. 220; Cheney v. Roodhouse, 135 Ill. 257.

Plaintiff's do not argue that the verdict is against the weight of the evidence. On the contrary, they ask this court to hold as a matter of law that defendants are liable for the failure of the administrator to comply with the technical terms of an order which was in their favor and compliance with which the uncontradicted

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statement of claim, and ded nage theep, we not to the identity breacoed the bond in filling and nullecting to arm over une crock or the value thereof on April %, 1329. To their claim to the fendants are listle as a ratter of law tag lite louse . recole, 68 III. 178; Salomon v. People, 191 III. (66; . cjensla v. reo)1e, 222 III. 325; and Haskins v. Mertin, low lat. Apt, 113, alk of To release the disar of the almost a grant to the transfer of the contract of The whole record word were telded on the dethem unnecessary. tend to was at all the but initial wall the tendent tendent delivery was postponed for the conventure or it to e request of the plaintiffs, or rows of turns. Wall to eviltude is in conflict as to some of the conversations , i. effect the vardict of the jury is that plaintiff's did repuret occionments and no person can, we think, reasonably draw any orner inference from the testimony of the witnesses in 11 the flate int circl traces agreating in the evidence. Plaintiffs site no cases and we only bedieve a case can be found in the outers where a party entirely vising and able to deliver under such an order, who postpones such delivery for the cenverience and as the request of an parties was ire to receive, has been hold libble in a citical for conversion or for negligence. Indeed, if there is a gliggence here, it is a the part of the concervitrices abon whom orderally recess the duty of taking the property of and confine for the cetter of the decorporate brother Not the administrator, but they were his a corre and quardiane, and the duty was unicarily apon them. Bond vs. necewood, 38 111. 220; Cheney v. Roodhouge, 135 111. 257.

evidence shows they waived and which (on conflicting evidence) it had been found by the jury, they prevented.

It is urged that the court erred in admitting over objection evidence of these conversations between plaintiffd and the defendant Dicus as to carrying out the order of June 29. contention is made upon the theory that the conservatrices are not the agents of their ward and could not bind his estate by their agreements. Plaintiffs cite Reams v. Taylor, 31 Utah, 288; Mc-Carthney v. Jacobs, 288 Ill. 568, and many similar cases. cases are not applicable. These conversations were not received for the purpose of establishing a contract between the incompetent and the defendant administrator, and this is not an attempt to bind the estate of the incompetent by any such contract. On the contrary this estate sues defendant Dicus for alleged negligence or default, and under such circumstances all the facts and circumstances material and bearing upon that issue were admissible as a part of the whole transaction upon which it was claimed the defendants were liable.

It is urged that the instructions were erroneous in that the court told the jury that if plaintiffs had themselves prevented delivery of the stocks they could not recover. We think the evidence justified these instructions.

It is also urged that the court erred in not granting plaintiffs' motion for a new trial upon the ground that newly discovered evidence showed that the administrator testified incorrectly with reference to the time when payment of the inheritance tax against the estate was made. There was an affidavit by one of the attorneys concerning this fact, which did not, however, directly contradict

At any rate the time of payment of the in-

plaintiffs' evidence. At any rate one time of heritance tax was not material or controlling. The judgment entered upon the verdict of the jury is right and it is affirmed.

AFFIRMED.

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M. DICUS, Conservatrices of the
Estate of LOUIS SCHERER, Incompetent,
Appellee,

YS.

JOHN B. DICUS and UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation,

Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

287 I.A. 611

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by John B. Dicus, administrator of the Estate of Henry Scherer, from an order entered October 3, 1935, by the Municipal court of Chicago, in a case wherein Emma Dicus, Ida Slavik and Bertha Dicus, as conservatrices of the Estate of Louis Scherer, incompetent, were plaintiffs and the United States Fidelity and Guaranty Company, a corporation, and John B. Dicus were defendants.

The order was entered upon the motion of the conservatrices plaintiffs and directed that the half sheet and record in the case should be corrected so as to show the filing of plaintiffs' Notice of Appeal on July 13, 1935, as originally stamped on the half sheet by the clerk, instead of July 12, 1935, as subsequently altered in ink, and directing the clerk to change the notation on the half sheet accordingly. The order further, on motion of plaintiffs, gave plaintiffs leave to restore a lost portion of the files, namely, plaintiffs' Notice of Appeal "heretofore filed herein on July 13, 1935," etc.

The importance of the change in date from July 12, 1935, to July 13, 1935, arose out of the fact that if the Notice of Appeal was filed in the clerk's office on July 12, then the report of proceedings of the trial, which was not presented to the trial court until September 11, 1935, was not filed or presented within

MENA DICUS, IDA SLAVIK and DERTHA A. DICUS, JOUESTVATTICES OF the Estate of LOUIS SCHERER, Incompetent, Appellee,

vs.

JOAN S. DIGUE SON UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation, ADDELISTS

APPEAL FROM MUTICIPAL COURT OF CITAGO.

SETIA. 611

EM. PRESIDING JUSTICE NATURETT DELIVERED THE OPTIMION OF THE OPTIMION.

This is an appeal by John B. Dious, administrator of the Estate of Henry Scherer, from an order entered October 5, 1935, by the Municipal court of Chicago, in a case wherein Hama Dious, Ids Slavik and Bertha Dious, as conservatrices of the Estate of Louis Scherer, incompetent, were plaintiffs and the United tates fidelitiand Guarenty Company, a corporation, and John J. Dious were defendants.

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sixty days after the filing of Notice of Appeal as provided in paragraph 1 of subparagraph C of Rule 36 of the Supreme court.

September 11, 1935, was 61 days after July 12, 1935. There had been no order entered extending the time for filing the Report of Proceedings, and, therefore, if the Notice of Appeal was filed July 12, 1935, a motion to strike it would probably have been granted.

Plaintiffs contend that the order was not a final and appealable order within the meaning of Section 77 of the Civil Practice Act, Illinois State Bar Stats. 1935, chapter 110, page 2449, and say that since the court found that plaintiffs' Notice of Appeal was originally stamped on the half sheet as having been filed July 13, 1935, and had been thereafter altered with pen and ink, there were matters of record from which the court could properly correct the record.

One phase of this cause was before the Third division of this court in a proceeding by way of mandamus to compel the Judge of the trial court to expunge from the record an order dismissing the appeal of plaintiffs and to settle and sign a report of pro-That petition was heard by the Third division of this court at the October Term 1934, and an opinion was filed December 23, 1935, directing that the order be expunged and writ of mandamus awarded - People of the State of Illinois for the Use of Ida Slavik et al., Appellant, vs. United States Fidelity and Guaranty Company and John B. Dicus, Appellees, 283 Ill. App. 627. The appeal of plaintiffs was thereafter filed in this court. The record included the Report of Proceedings. It has been considered on its merits and an opinion this day filed which affirms the judgment of the trial court. Plaintiff's have therefore secured the advantage of their appeal and the defendants of the judgment in their favor. The questions now discussed ere mere moot questions which will not be further considered by the court. The appeal of the defendant

APPEAL DISMISSED.

O'Connor and McSurely, JJ., concur.

will be dismissed.

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the trial court. Plaintiffs have an exclure accured the alvantage of their appeal and the deficuants of the far tent in their favor. The questions now discussed or norm most prestions now discussed or norm most prestions the considered by the court. The appeal of the defendant will be discussed.

APPEAL DISKISSED.

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FLORENCE UHLIG.

Appellee,

Vs/

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, a Corporation, Appellant. OF COOK COUNTY.

287 I.A. 611

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit seeking to recover as beneficiary the double indemnity provided for in four life insurance policies issued by defendant on the life of her husband, George A. Uhlig; the face amount of the policies had been paid and by this suit plaintiff sought to recover the additional amount, alleging that the insured died as the result of an accident; upon trial she had a verdict for \$1342; judgment was entered and defendant appeals.

The complaint alleged that the policies contained provisions that upon receipt of due proof that the insured has sustained bodily injury solely through external, violent and accidental means, resulting in the death of the insured within ninety days from the date of such bodily injury, the company will pay an additional amount equal to the face amount of the insurance stated in each policy; that the insured died November 28, 1933, through bodily injuries sustained solely through external, violent and accidental means; that October 11, 1933, he fell down the stairs on the premises occupied by him as a tenant, receiving injuries which proximately caused his death on November 28th.

Defendant denied that the death of the insured was caused by such injuries, denied that the fall down the stairs caused the death of the insured, and alleged that his death was caused by heart trouble and not on account of any bodily injuries received solely through external, violent and accidental means.

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Plaintiff brought suit secting to resour us constains the double indemnity provided for in four life instance of plaints is sound by defendant on the life of her lactuard, vector at the face amount of the positions and seen paid and by this wit plaintiff sought to recover the auditions amount, sixt, in the insured dies as the result of an ecolomot; upon this as and a verdict for \$1343; judgment was entered and defendant on the

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Defendant deried that the deat of an insured was exceed by such injuries, destet that the fall down the attime on sed or edeath of the insured, and alleged that all instrument or coused by heatrouble and not on account of any redily infort a reading sulety through external, indext and accidental means.

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Westerlin & Campbell Company, removing a refrigerating continuous coil about 30 or 35 feet long, out of a room to be placed upon a truck; eight men, including the insured, were handling the coil; they were resting just before placing it on the truck, when suddenly the insured collapsed and fell down; a Dr. hunson was summoned who came about ten minutes later and pronounced him dead; this Doctor testified that in his opinion "internal organic trouble caused his death. I mean by that, that was not an accidental death"; that the body, particularly the face and head, was very much congested, bluish, red, and that this indicated that death was due either to apoplexy or a heart condition.

There was also/evidence proceedings brought by plaintiff against the insured's employer, in which plaintiff signed and filed before the Industrial Commission of Illinois a claim for compensation in which it was stated that George Uhlig "was killed in an accident" and had died of heart disease. This claim was compromised by the payment by the employer to plaintiff of \$200 in a lump sum. Under the terms of the settlement it was stated that the employer denied that the deceased had any accident, but that "Deceased died of organic heart disease, as per doctor's report and death certificate attached," and that the widow (plaintiff here) had agreed to accept this lump sum in full of all claims.

Plaintiff produced evidence tending to show that the fall of the insured on the stairs on October 11th produced a big lump on his head - over the left eye; that he was in bed one day but usual did not have a doctor, and thereafter proceeded about his/affaire and employment; that there was a marked change in his disposition; that he did not seem to be as pleasant as before the fall but was cross and unfriendly. It scarcely needs argument to support the conclusion that this fails to prove that the fall on October 11th caused his death on November 28th.

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Plaintiff produced ovider de tenso, as a construct on the fall of the insured or the string of the insured or the string of the insured or the reft eye; and a construct of the second o

But counsel for plaintiff argue that Dr. Weiner, testifying as an expert, gave evidence tending to support plaintiff's claim. In answer to a hypothetical question Dr. Weiner testified that "the cause of death could or might be produced by the injury to his head on October 11th." In Doyle v. Prudential Ins. Co. of America. 280 Ill. App. 628, we had occasion to pass upon similar testimony of an expert witness who said that there "might or could be" a causal connection between an accident and the insured's death. We there said that the plaintiff had the burden of proving that the insured sustained bodily injuries solely through external, violent and accidental means resulting in the death of the insured, and that the evidence of the expert did not meet this requirement. We said that the opinion of the expert was merely surmise or conjecture, and that this cannot be regarded as proof, citing Stevens v. Illinois Central R. R. Co., 306 Ill. 370. A similar case was under consideration in National Life & Acc. Ins. Co. v. Kendall, 248 Ky. 768, where the court said that the circumstances might raise a "supposition" that an accident caused the fatal disease, "but a supposition is not enough: a judgment cannot be rested on a supposition." Applying what has been held in these and other cases, we are of the opinion that plaintiff failed to prove the essential. allegations of her claim with reference to the cause of death.

At the conclusion of all the evidence defendant moved that the jury be instructed to find the issues for defendant, which motion was denied. As there was no evidence to submit to the jury the motion should have been allowed.

For the reasons above indicated, the judgment is reversed without remending the cause.

Matchett, P. J., and O'Connor, J., concur.

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CITY OF CHICAGO,

Appellee,

vs.

SOL BERNSTEIN,

Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

287 I.A. 612

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Defendant, tried by the court, was found guilty of the violation of section 4283 of an ordinance of the City of Chicago, fined \$100, and he appeals.

The ordinance provides that it shall be unlawful for any person to post, stick or tack any notice, sign, etc., calculated to attract the attention of the public, upon any building without first obtaining the written consent of the owner, agent, lessee or occupant of such premises.

Defendant first says that this ordinance is void as unreasonable and beyond the power of the City to enact and enforce, citing Wice v. C. & N. W. Ry. Co., 193 Ill. 351; there it is said that the power of the city was limited to the enactment of such ordinances as promote the public good, and an ordinance which prohibited anyone alighting or boarding ant car while it was in motion was held void; that the ordinance was unreasonable as it applied to places where it would be safe to alight when the train was moving slowly. It was held that this was not related to any question of public safety. In Consumers Co. v. City of Chicago, 313 Ill. 408, it was held that the police power extends to protection of the lives and health of all persons, "and the protection of all property within the State." Chicago v. Green Mill Gardens, 305 Ill. 87. The posting of signs on a building is in the nature of a trespass, and the legislature has passed laws intended to protect owners of property against trespass. Ill. State Bar Stats. 1935, chap. 38, par. 594. In Saxton v. City of Peoria, 75 Ill. App. 397,

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SOL BERNMELK,

237 I.A. 516

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RE. JUSTICE RECOVER CHILDER) I COLLECTED OF LOUIS

leferder, tried , the court, we find the cf the violation of section 4288 of or ordinance of the tip c. mic.r., fined \$100, and he appeals.

The ordi ance provides list it shall be unlimible in any person to post, stick or tack any notice, sign, etc., calculated to attract the attention of the nubric, pon any later written earement of the owner, were, leaved or occupant of such previses.

Defendant first says that this ordulated is voil as unreasonable and beyond is e power of the Vity to enach and matrices, eiting Wice v. C. .. . F. Ay. Co., 193 Ill. Ich; were to in add that the power of the ofty was limited to the rase, it of ordinances as promote the public, and, and an arrand as securion hibited anyone aligniting or bounding say our a life it was in motion was held void; that the or the co was morrow; ale so i. Jolind to places where it would be effect of digit and one truth the moving slowly. It was belief that the was not received to dury queetion of public extety. In Consumers co. v. dit: of chicker, 313 111. 408, it was beld that the molice onver extrast to protection of the lives and health of it erries, "an a rection of all property within the "t te." whice o v. urean will darkens, 305 III. 87. The posting of sine on a bul ding is in the neture of a trespass, and the legipl ture as passed law incended to now teet owners of property against trasquess. Ill. Stree har street, 1936, ohep. 38, par. 594. In Janier v. Uity of Feeris, 78 111. App. 387, the court sustained as valid an ordinance which forbade anyone from trespassing upon any private premises. The ordinance in the instant case has for its purpose the protection of the property owner and is a reasonable exercise of the police power on behalf of the citizens.

Complaint is made that the judgment is void as finding defendant guilty of the violation of another city ordinance rather than the one under consideration. The entry of the erroneous judgment was due to a clerical error of the clerk of the Municipal court who confused the section number of the ordinance. This error has been corrected and a supplemental record showing the correct judgment has been filed in this court.

Complaint is also made that the procedure was not according to the Municipal Court act in that the complaint was not sworn to by the police officer who made the arrest. The complaint was sworn to by a private individual who claimed to have seen the commission of the offense. The argument seems to be that under section 49 of the Municipal Court act, chap. 37, Ill. State Bar Stats. 1935. par. 438, a police officer may arrest only when he has seen the act violating an ordinance. This is true if the officer is the only one who sees the act of violation, but paragraphs 2 and 3 provide for a complaint by a private person. The evidence here shows that no police officer saw the alleged offense, but the private person who signed the complaint testified that he saw it and notified the officer of the offense, who made the arrest. would be unreasonable to construe the statute as holding that a private individual who saw an offense, not seen by a police officer, cannot sign the complaint, which would mean that only those offenses observed by an officer could be prosecuted.

Defendant is on more substantial ground in his argument and that the evidence is insufficient to support the finding/ the

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judgment. Two witnesses testified that they saw defendant pasting a sticker on the building. Defendant denied that he had done this. As we have said, the ordinance is directed against a trespass, and the acts mentioned are not unlawful when done with the consent of the owner, agent, lessee or occupant of the premises. The absence of consent is therefore an essential ingredient of the offense. In order to establish the guilt of defendant it was incumbent upon the prosecution to show that the poster was fixed to the building without the consent of the owner or his representative. There was an absence of any evidence to this effect.

Whether it is necessary to prove negative averments depends upon their nature and character, and as a general rule, where it is as easy for the plaintiff to prove the negative as it is for the defendant to disprove it, the burden of proof rests upon the plaintiff. Great Western R. R. Co. v. Bacon, 30 Ill. 347. In Sokel v. The Psople, 212 Ill. 238, it was said that where an act is made criminal, with exceptions embraced in the enacting clause creating the offense so as to be descriptive of it, the People must allege and prove that the defendant is not within the exceptions. In Abhau v. Grassie, 262 Ill. 636, it was said that courts must apply practical common sense in determining this question: that when the means of proving a fact are equally within the control of each party, then the burden is upon the party averring the negative; that the defendant has the burden only when he alone is in possession of proof that would disprove the negative averment and the other party is not in possession of such proof. In The People v. Talbot, 322 Ill. 416, it was held that where a statute defining an offense contains a proviso which is so incorporated with the language describing the offense that it cannot be described if the exception is omitted, such exception must be negatived in an indictment.

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As we have said, the provision of the ordinance in question conditioning the unlawfulness of the act upon the non-consent of the owner, makes this non-consent an essential element of the of-fense.

The City says that as defendant filed no written affidavit of defense he is confined to his oral testimony for his defense. The procedure in an action by a city to recover a penalty for the violation of an ordinance is quasi criminal, and it was not necessary for defendant to file a written affidavit of defense. City of Chicago v. Dickson, 221 III. App. 255.

The fact that defendant denied pasting any sticker on the building did not release the City from proving that the act which its witnesses testified to have seen was done without the consent of the owner.

For the reason that the evidence failed to prove an essential element of the offense charged, the judgment is reversed.

REVERSED.

Matchett, P. J., and C'Connor, J., concur.

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In the Matter of THE ESTATE OF DANIEL GAWNE, Deceased.

Appeal of CLARA V. GAWNE, Executrix under the Last Will and Testament of Daniel Gawne, Deceased,

Appellant,

YS.

In Re Claim of WILLIAM L. O'CONNELL, Successor Receiver of the Lincoln State Bank of Chicago, Appellee. APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

287 I.A. 612

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit court in an appeal from the order of the Probate court allowing the claim of the receiver of the Lincoln State Bank against the executrix of the last will and testament of Daniel Gawne, deceased.

We have detailed the facts and evidence heard in case No. 38939, opinion this day filed. In that case we have reversed the order of the Circuit court dismissing the complaint in equity, and have remanded the cause with directions to reform the note in controversy so as to show on its face that Daniel Gawne signed it "as Treasurer" and not in his individual capacity.

As we will assume that what should be done has been done, we will assume that the note has been reformed as indicated so that there is no liability against Daniel Gawne or his estate, and the judgment is reversed without remanding.

REVERSED.

Matchett, P. J., and O'Connor, J., concur.

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Matenatt, ". J., and o'Centur, 1., chans.

CORA MOEN.

Appellee.

RUTH'S BEAUTY SHOPPES, Inc., Corporation. Appellant.

APPEAL FROM MUNICIPAL OF CHICAGO.

287 I.A. 6123

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff sought damages for alleged unskillful and negligent performance of defendant's services in giving plaintiff a permanent wave and upon trial by the court had a judgment for \$100, from which defendant appeals.

It is first said that the statement of claim is insufficient to support the finding and judgment in that it fails to allege that plaintiff was in the exercise of due care and caution for her own safety. Defendant filed an affidavit of merits in which it denied that the work was unskillfully and negligently performed, and alleged that it used the highest degree of care in giving plaintiff a permanent wave. No motion was made to strike the statement of claim except at the beginning of the trial, when counsel for defendant made a verbal motion to strike, which the court denied.

In an action of the fourth class in tort where the statement contains all the elements necessary to the cause of action so far as the defendant's duty and the breach of it are concerned, it is not necessary to aver a fact in no way connected with the tort. Lyons v. Kanter et al., 210 Ill. App. 78. And the same case in the Supreme court (285 III. 336) where the court said. "we will not. with the whole record before us, reverse the judgment for the purpose of letting the parties raise in a more formal way an issue of which they have already had the benefit of a full trial."

Plaintiff testified as to the application of the appliances

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CORA MOUN, to sellee.

BUTH'S BEAUTY SHOPPES, Inc., a Corporation,

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Tirring turks.

257 L.A. 612

RR. JUSTICE MCSURELY DELIVERED THE OPIATOR OF THE COURS.

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Plaintiff tradition as to the plant of the application of the applications of the property of

used in the giving of a permanent wave; they began to burn her head and she so told an attendant, who blew under the hair to cool it; it continued to burn but the attendant said this was because the hair was "very curly and it would be all right." She suffered pains during the night and blisters formed and the next morning she went to defendant's "Parlor" and complained of the burn and was given a jar of salve to put on the burned spots; they advised her to call on Dr. Summers if it did not get better; she called on Dr. Summers who treated her.

Defendant makes the argument that these injuries were not burns but were blisters caused by pulling the short hairs. However, defendant's witness, Dr. Summers, testified that plaintiff's injury was caused by a burn; that he found "evidence of a second or third degree burn." Evidence to the same effect was given by another doctor called by defenda t, who testified that it was a third degree burn and that the wound did not look as if it were caused by pulling the hair. The evidence of defendant's three Boctors established that the injury was a burn.

The facts in this case are similar to those involved in Higgins v. Byrnes, 274 Ill. App. 440, where similar injuries were considered and a judgment sustained for the plaintiff, the opinion citing numerous authorities on the subject.

We see no reason to disagree with the finding of the trial Judge and the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

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HAROLD R. SCHRADZKI,

Appellant,

VS.

PATRICK WARREN and PATRICK WARREN CONSTRUCTION COMPANY, a Corporation,

Appellees.

APPEAL FROM ORDER OF CIRCUIT COURT OF COOK COUNTY GRANTING A NEW TRIAL.

287 I.A. 6124

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit on a quantum meruit basis to recover for services rendered by him as attorney for the defendants, upon trial had a verdict for \$15,000; the trial court sustained defendants' motion for a new trial, saying he could see no error in the record but was of the opinion the verdict of the jury was excessive; the new trial was granted solely upon that ground. Plaintiff petitioned this court for leave to appeal from this order, which was granted, thus presenting for determination the propriety of the order.

Defendant Patrick Warren approached plaintiff with a view to securing his services for defendants in certain matters requiring an attorney. There is some dispute as to the terms of employment. Plaintiff testified that he told Mr. Warren he would charge reasonable and fair fees. Warren testified the agreement was to pay plaintiff \$100 a day for every day he spent in court, and anything done outside of court would cost defendants nothing. There was other evidence tending to support plaintiff's version of the terms of employment and the jury was justified in accepting plaintiff's testimony on this point.

Plaintiff testified in detail as to his work as autorney in representing the defendants in some fifteen matters, nearly all of them involving a trial in court. The evidence shows they were conducted by plaintiff with professional skill and singular

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success.

Two attorneys practicing at this bar gave expert opinion testimony as to the reasonableness of the charges made by plaintiff for these services. Each of the witnesses valued the services at a substantially higher figure than that claimed by plaintiff and far in excess of the amount allowed by the jury. Defendants introduced no evidence to contradict that given by these attorneys.

Warren gave testimony tending to minimize the services rendered by plaintiff in what is called the "Nurses! Home" matter. This involved a contract by defendants to build for the County of Cook a home or dermitory in Chicago for \$1,410,000; Warren intimated that plaintiff was not an important factor in handling the contracts involved. Plaintiff testified in detail as to his services in this matter, and the attorneys testifying also went into details as to their value.

In the written motion for a new trial defendants presented only two points: (1) That the court erred in striking from the evidence the testimony of Patrick Warren to the effect that plaintiff was not employed by either or both of the defendants in connection with the Nurses' Home matter. (2) That the verdict was excessive. As to this second point, we are of the opinion that the amount of the verdict was well within the scope of the testimony and should be allowed to stand.

As we have indicated, Mr. Warren gave testimony intimating that plaintiff did not represent defendants as attorney in the Nurses' Home matter. The ruling of the court excluding this testimony was proper. In the sworn enswer filed by defendants they admitted that plaintiff represented one or both of the defendants in all of these matters, including the Nurses' Home matter.

Section 40, Civil Practice act, chap. 110, par. 163, Ill.

State Bar Stats. 1935, provides that every answer shall contain an

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testimony as to the reasonableness of the proper deby similar for these services. Much of the ritheseos allast securiors at a substantially higher figure than that claimed by of initial atterms in excess of the smooth allowed by the jury. Perculaities fortendadded as evidence to contradict that inch by these or anner.

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Section 40, civil Prietics act, 113, a.r. 163, Ill. State Far State . 1955, provides that ever, waver and is contain an

"explicit admission or denial of each allegation of the pleading," and it is also provided that "every allegation """ not explicitly denied shall be deemed to be admitted." When, therefore, in defendants' sworn answer it was admitted that the plaintiff represented them in all the matters claimed, they could not be heard either directly or by innuendo to say that plaintiff had not represented them in any of these matters. It is elementary that a partywill not be permitted to disprove that which he has admitted in his pleadings. Wabash Ry. Co. v. Billings, 212 III. 37.

In this court, for the first time, defendants make the point that the evidence shows that the liability of the two defendants, if any, is several, and that the joint verdict is not supported by the evidence. The written motion for a new trial claimed only two points of error, which we have already stated. Nothing is contained in that motion which raises the question defendants now present, nor was the point raised or suggested upon the trial. It is a well settled rule that no points may be urged on review which are not embodied in the written motion for a new trial or raised upon the trial. All existing grounds not so specified in the written motion for a new trial are waived. Heilig v. Continental Casualty Co., 280 Ill. App. 142; McNulty v. Hotel Sherman Co., 280 Ill. App. 325; Spring Valley Coal Co. v. Chiaventone, 214 Ill. 314; Miller et al. v. McManis, 57 Ill. 126; Illinois Central R. R. Co. v. Johnson, 191 Ill. 594;

The objection goes only to the form of the verdict, and defendants, if they wished to object to this, should have made their objection when the form was submitted to the jury.

Moreover, there was evidence that Patrick Warren was the president, general manager and general agent of the defendant corporation and the principal beneficiary of the stock. The interests of both defendants are identical. The only payments ever received

"explicit addition or decided that " very stage of a second to it is also provided that " very stage, where the shall be decided to be editiveled in second to be editiveled in second answer is van additiveled to the second answer is van additiveled them in all the mestors obtained, say sould not be all the mestors of the second and stage and there in any of these matters. It is elementary that it says ill in the not be permitted to disprove that which ne " as an itsee in the pleadings. Whosh we is a litter in the pleadings. Whosh we is a litter in the pleadings. Whosh we is a litter in the

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Moreover, there was and above the control of the call orrangers, president, percent not of and pareston and the gradient of the control of both lefendants are interests. It can be successful before the control of the

by plaintiff for services rendered were in the form of checks of the Construction company, which were in payment of services defendants now claim were for the sole benefit of Patrick Warren individually. We think the evidence justifies the conclusion that Patrick Warren was doing business under a "corporate veil."

The evidence fully justified the verdict, and there were no reversible errors upon the trial.

For the reasons above indicated the order granting a new trial is reversed and the cause is remanded to the trial court with directions to deny defendants' motion for a new trial and to enter judgment for the plaintiff of the verdict rendered.

REVERSED AND REMANDED.

Matchett, P. J., and O'Connor, J., concur.

by plaintiff or reviews reader 3 ore in an acres of the Construction of pany, which were in parameter at the constants now claim were for an activation and a residence in the fadividuality. We takink the enddence justifies the constanton that Patrick Warren was doing pusiness thought a respectite valie.

the evidence fully partitle, that a start, and the were no reversible errors upon that it.

For the reasons above indicated and cross court trial is reversed and as durant to with directions to deny defendants' no december or a new trial as to enter judyment for the parastin of the vertex reserve.

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Matchett, F. J., and O'comor, J., concur,

KATHERINE B. COMSTOCK et al., (Complainants) Appellees,

VS.

MORGAN PARK TRUST & SAVINGS BANK, (a banking corporation), ADELINE BENJAMIN, ALLEN T. PRICE, ENOCH J. PRICE, ESTHER PRABEL PRICE, HELEN N. PRICE, HUGH G. PRICE, LILLIS PRICE ARMSTRONG, LOUISE A. (Defendants)

ADELINE BENJAMIN, ALLEN T. PRICE, ENOCH J. PRICE, ESTHER PRABEL PRICE, HELEN N. PRICE, HUGH G. PRICE, LILLIS PRICE ARMSTRONG and LOUISE A. PRICE,

Appellants.



APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

287 I.A. 613

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

A person who had a small deposit in the Morgan Park Trust & Savings Bank, brought a representative suit in equity to enforce liability against the stockholders of the bank in favor of the creditors of the bank, which was closed and in possession of the Auditor of Public Accounts. Afterward a few other persons who also had small deposits in the bank joined as complainants. The case was referred to a Master in Chancery, who took the evidence, made up his report. fixed the liability of stockholders, and a decree was entered in accordance with the recommendations of the master. A few of the stockholders, against whom the decree was entered. appealed to the Supreme court contending that constitutional questions were involved. The Supreme court, upon consideration, held that the constitutional questions raised had been many times decided adversely to defendants' contention and were no longer open for consideration, and that case was transferred to this court .- Comstock v. Morgan Park Trust & Savings Bank, 363 Ill. 341. The court in its opinion said that one of the contentions made by defendants challenges the validity of the amendment of 1929 to section 11 of

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NORGAL Paka I ROST & SAVING SOME, (a benking corporation), absaiks DENJAMIN, ALDEN T. PHIOS, LECT J. PRICE, AUTHER PRABMI PHIOS TALEN N. PRICE, MUGE 9. PHIOS, LILLIS PHIOS ARKSTEDNG, LOUISE A. PRICE et 11. (Defendante)

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237 L.A. 513

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the general Banking act, which empowers the court to authorize the payment of complainants' solicitor's fees and other costs of litigation out of moneys collected from stockholders. Appellants are in no position to raise this question. The decree appealed from made no allowance for solicitor's fees. They were allowed in former orders, to which no objections were made and from which no appeal was perfected. Even if there were grounds for resistance to the allowance of such fees, the creditors, and not the stockholders, are the only ones who could object, as the stockholders have no interest whatever in the distribution of the funds which they are compelled to pay. The stockholders are not concerned about how much or how little may be allowed as solicitor's fees or whether any are allowed at all. Their liability is neither increased nor diminished by such an allowance, if made."

The record discloses that a meeting of the Board of Directors of the Morgan Park Trust & Bavings Bank was held at four o'clock Sunday afternoon, January 24, 1932, at the home of the president of the bank in Chicago, at which time a resolution was adopted which recited that "on account of the continual withdrawals by depositors on their resources, the secondary reserves of the bank have been exhausted to the extent that the bank feels it is unable to meet such continual withdrawals." And it was resolved that "in order to conserve the assets for the benefit of the creditors of the bank, the Auditor of Public Accounts be and he is hereby requested to take charge for the purpose of examination and such other action as he deems proper, and that a copy of this resolution be immediately transmitted to him."

The following day, Monday, January 25, the Auditor of Public Accounts took charge of the bank as requested, and it was not opened thereafter. An hour or so after the Auditor took possession the complaint in the instant case was filed by M. Lipshitz, who al-

the general Banking act, which empowers the court to uthorize the payment of complainable! solicitor's fees and other costs of litigation out of moneys collected from stockholders. Appellants are in no position to raise this question. Incresses appealed from made no allowance for solicitor's fees. Deviver allowed in torner orders, to which no objections were made and trow waich no appeal was perfected. Even if there were grounds for resistance to the allowance of such fees, the creditors, at not the stockholters, are the only ones who could object, as the creditable have no interest whatever in the distribution of the funds which they are compelled to pay. The stockholders are funds which they are allowed at all. Their libility is referred about now any are allowed at all. Their libility is referred to recessed nor any are allowed at all. Their libility is referred to recessed nor

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The following day, kentay, January 26, the Auditor of Jublic Accounts took charge of the bank os requister, and it was not opened thereafter. An hour or so after the Auditor Took appearion the complaint in the instant case was filed by a. Lips its, who elstockholdere

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leged that he had on deposit in the bank \$167. And the prayer was that the directors be held liable under the provisions of section 6 of article 11 of the constitution of this State; that a receiver be appointed to receive and disburse the moneys collected from the stockholders and that an injunction issue enjoining all other persons, who claim to be creditors, from instituting any suit against the directors to recover their stock liability.

It was alleged in the bill that before the commencement of business January 25, 1932, the Auditor of Public Accounts made an examination of the bank to determine its financial condition, and had closed the bank and taken control of its property to prohibit the further carrying on of its business; that the bank was indebted in excess of one and one-half million dollars and its assets were carried on its books in excess of one million dollars; that it had ceased to do business and was wholly insolvent and that the bill was brought on behalf of complainant and all other creditors.

Tebruary 25, 1932, the Auditor of Public Accounts found that the bank could not be reorganized and should be liquidated through a receivership, and in compliance with the statute he appointed a receiver. March 4, 1932, the Auditor filed his bill in the Circuit court of Cook county for the liquidation of the bank and his appointment of the receiver was confirmed. Afterward an amended and supplemental bill was filed in the instant suit. There were numerous and protracted hearings before the master, and while the evidence was being taken the defendants who prosecute this appeal, on October 18, 1934, filed their cross-bill in which they set up that the receiver appointed by the Auditor had paid a "dividend" of 25% to the general creditors of the bank, and they sought to have the amount of this dividend credited, and prayed that the complainants be enjoined from continuing the prosecution of the suit until the result of the final liquidation of the assets of the bank might be ascertained

It was alleged in the cill test become a correction of business January 28, 1939, the endiror of which is a contract of accomplished of the wall of the order of the order of the order of the order correctly of the order of the test of the test of the contract of the con

and determined. The cross-bill was, on motion of complainant, stricken for want of equity.

The record discloses that the bank was insolvent, as shown by the resolution of the board of directors, at the time it was taken over by the Auditor of Public Accounts January 25, 1932; and it further appears the assets of the bank were in the possession of the receiver, and if we assume the stock liability sought to be enforced be collected in full, the total assets will be wholly insufficient to pay the creditors.

Defendants contend that since the original bill was filed at 10 a. m. of the day the bank was closed by the Auditor, the suit was premature and cannot support the decree of March 4, 1935. which is the decree appealed from. And the argument is that at the time of the filing of the bill, the bank "had not gone or been put into liquidation, and the Circuit court had no jurisdiction to entertain the original bill." That the Auditor at the time he took possession, and prior to the filing of the bill, had not made an examination of the bank to determine whether it was insolvent or not. We think the contention cannot be sustained. The directors admitted insolvency. The liability of a stockholder in a bank is a primary one imposed by the constitution and the statute. His liability is contractual. Heine v. Degen, 362 Ill. 357. that case a bill was filed in behalf of complainants and certain other creditors to enforce the stockholders' liability under section 6 of article 11 of the Constitution and under the statute on Banking. And it was held that the right to maintain such a representative suit could not again be questioned in view of the former decisions of the Supreme court, citing Golden v. Cervenka, 278 Ill. 409, and other cases. The court there also held that it was not error to deny defendants' motion to proceed without first requiring the claims of creditors to be proved, and said (p. 373) that, "It

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and determined. In tross-cill may, the three country stricker for want of equity.

The resolution of the boson of tructure to the total of was nown by the resolution of the boson of tructure to the total of was taken over by the Auditor of Patlie Accounts Court of, 1982; and it further appears the apacte of the bold with the ingression of the receiver, and if we assume the storist collision to be enforced be collected in full, 1999 total usuate will servicing insulations.

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is not a prerequisite that all claims be proved by the creditors in order to determine the amounts owing by the individual stock-holders who are primarily liable. Continuing the court said (p. 379): We reviewed the authorities in that decision, and from what it contains there can be no question that the cause of action here is contractual. The liability is a primary one imposed by the constitution and the statute, and is read into the contract of purchase, by operation of law, whenever a share of stock is bought.

A bank is insolvent when it is unable to meet its liabilities as they become due in the ordinary course of business; it is insolvent when it cannot pay its depositors on demand. Babka

Plastering Co. v. City State Bank of Chicago, 264 Ill. App. 142.

In the Babka Plastering Co. case an amended and supplemental bill was filed on behalf of the complainants and all other creditors to enforce the constitution superadded liability of stock-holders. It was contended that the evidence failed to show that the bank was insolvent. The court there said (p. 160): "it was not necessary to prove that the bank was insolvent as the liability of the stockholder to the creditor is primary, and is regarded as that of partners, occupying the same relation to the creditor as the bank itself, owing the same debt to the depositor as the bank owes, and he can be sued for the debt just as the bank may be sued, and as soon as the bank may be sued."

Defendants further contend that complainants did not come into equity with clean hands; that "in a case of this kind where the Court must rely on the good faith and disinterestedness of the complainants and their solicitors for the proper representation not only by their own claims, but those of all other creditors whom they are allowed by statute to represent"; that the complainant alleged he had a deposit in the bank of \$167; that the bill was signed and sworn to not by complainant but by one of his solicitors;

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Defendants sather content that which is the temporal factor equity with all an invals; that "the temporal tile is in the temporal must rely of the cool faith and sint temporal factor of the complainants and their solicitors for the or or a second tile not only by their own claims, the theological of the court of the salessed he had a seposit in the bank of "117; the court of his solicitors; signed and sworm to not by samplificant of the court of his solicitors;

that it was prepared on a mimeograph form by filling out blank spaces; that it was incomplete, or greatly exaggerated all the facts, as later appeared from the evidence; that it was filed a few hours after the Auditor began his examination; that on the hearing it appeared that complainant had a balance of only \$5.69 on deposit; that he did not, before the bill was filed, consult with his solicitor who purported to represent him; that afterward complainant was given leave to file an amended and supplemental bill in which another complainant joined him, who had filed a similar bill in the Superior court of Cook county; that some other persons who became co-complainants were young children who had savings accounts in the bank subject to their fathers' control.

The record discloses that on the day the bank was closed and on which date Lipshitz filed his bill in the instant case, two other similar cases were filed in the courts of Cook county, and we think it apparent, in view of all the facts, that it may be safely said the suits were not filed primarily for the benefit of the creditors but rather to obtain solicitors' fees. (See Cohen v. Central Republic Trust Co., 282 Ill. App. 569.) But in view of what we have above said, to the effect that a creditor had a right to file such a suit as soon as the bank closed, and that the statute (sec. 11) provides that solicitors' fees may be allowed, we think the objections urged are not vital to the maintenance of the suit. Section 11, chap, 16a, Illinois State Bar Stats. 1935, which authorizes the filing of the suit, provides that the liability of stockholders of a bank "may be enforced by any creditor of such association by bill in equity, in the nature of a creditor's bill brought by such creditor on behalf of himself and all other creditors of the association against the shareholders thereof, in any court having jurisdiction in equity for the county in which such bank or banking association may have been located or established."

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The record discluses that on the lay the bir was cloud and on which date lipshits filled is bit to the instructions, two o the similar cases were riled to the courte of do and analy. think it app rest, in view of sil the flore, flat i said the suite were not first risk from a low alies off bise ereditors but rather to it or at the relief to a continuing Central Republic Print Co., 887 III. 200. 508.) - 2 in alem of what we have above taid, to one tileet that the too be the to file such a suit as soon of the loads, of the such a file (11) provides that which are of 'washield tall' salivery (11 .008) the objections in red are not v tal a sure and an are Section 11, enog. 16%, Illinois Ut to or to . 1.0, raide wathorises tre fillia of the tall, arying the facility of stockinders of a bank "may be informed ! " of erebloidests association by bill to conity, i ce or of a creditor's will rotifier) and to the life of the left of a titing of the rotification of the rotificat of the association which the court over ther of, is any court having jurisdiction in a alterior the anaty of income and or banking association ask over the locates of established

Defendants further contend that the original, amended and supplemental bill alleged that the bank was insolvent and that its liabilities were greatly in excess of its assets when the receiver was appointed by the auditor; that this was the gist of the case and that the proof failed to sustain these allegations. And the further point is made that the court erred in dismissing the defendants' cross bill because this is the proper procedure where defendants seek to bring into the case matters which arose after the case was at issue. Counsel for complainants say that the evidence shows the bank was insolvent and that this is shown because nearly 32 years after the bank was in liquidation it still owed its creditors nearly five hundred thousand dollars. Defendants reply that, applying the 25% paid by the receiver whomwas appointed by the Auditor, the unpaid liabilities are \$426,589, and not \$500,000, and that "liquidation has continued since that time must be conceded - to what extent this record does not disclose." Since the bank was admittedly insolvent at the time the original bill was filed, and has continued to be insolvent, we think the allegations of the original amended and supplemental bill have been sustained. And since the liability of the defendant was primary, as the authorities all hold, the allegation of the cross bill that a 25% dividend had been paid by the receiver appointed by the Auditor, was wholly immaterial. The amount of the liability of each stockholder is fixed wholly independent of any dividends that may be paid.

Complaint is made that it was error for the court to admit in evidence calculations made by an Auditor from the records of the bank which show the liabilities, etc., of the bank. The books were voluminous and were sufficiently identified. The auditor was

Defendants further contend that the original, a shift of and supplemental bill alleged that the bane was inside it and ite limbilities were greatly in excess of its seests when the receiver was appointed by the audiror; that this was the gist of the case and that the proof failed to sastatu tasse allegginnes. And the -op ont gaing its made that the court erred in distinging the epfendants' cress bill because this is the proper appeading an defendants seek to bring into the case metters laich arose mitar the case was at issue. Counsel for complainants say that the evierice shows at aird Jan'd but tuevious is wined and awone south mearly 34 years at ter the tank was in liquidation it still its creditors nearly five hundred thousand fortre. Jefec leate reply that, applying the 25% outd by the receiver men as appointed by the Auditor, the unpaid liabilities are \$486,639, and not \$500.000. and that "liquidation has continued since tast collegit for seed breast whit this extent the recept deep not -Since the bank was admittedly insolvent at the thus the crightal bill was filed, and has continued to be insclient, we think the eran fild lefarms look and bebream innighte end to encitegells been sustained. And since the liability of the defenters primary, as the authorities all hold, the allendron of the cross bill that a 25% dividend mad been paid of the receiver appointed by the Auditor, was wighly immeter it. It should of the liability of each stockholder is fixed wholly independent of any dividends that may be paid.

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qualified and in these circumstances there was no error in admitting the audit in evidence. People v. Gerold, 265 Ill. 448; Golden v. Gervenka, 278 Ill. 409.

In the <u>Gerold</u> case the court said (p. 460): "Where the originals consist of numerous documents, books, papers or records which cannot conveniently be examined in court and the fact to be proved is the general result of an examination of the whole collection, evidence may be given as to such result by any competent person who has examined the documents, provided the result is capable of being ascertained by calculation." Citing a number of authorities.

Defendants further contend that the fees allowed to the-Master were not warranted. The Naster filed three itemized statements showing the work done and the several amounts he requested. The first and second were objected to and then the third was filed. There are three items: (1) The Master certified he had taken and had reported 344 pages of testimony containing 860 folios at 15 cents a folio. for which he charged \$129; the second item was for \$1174.65 for examining exhibits which included the certificates of organization of the bank, orders of court appointing a receiver. stock certificate books, totalling 7831 folios at fifteen cents a folio. The third item claimed was for \$1550 for obtaining files. docketing and hearing cause, reporting, and hearing objections, The Master certified the cause had been very sharply contested from the outset, entailed an unusual amount of labor, and that he set the case for hearing and continued it ten times; that there were hearings on fourteen different days, in which 35% hours were required, that he received a number of letters, made many telephone calls, etc. The court allowed half this amount of \$1550, or \$775. The record contained 1687 pages. The first item allowed in accordance with the statute, section 20, chap. 53, Ill. State Bar

enalified and in these direct theore the was a error in abitting the audit in evidence. Proude the audit in evidence. Proude the verte, No. 112. ...; calm to Cervenka, 273 111. 400.

In the Gernli case the court with (A. 49); "In rether ori inels on it of all alcoration it of alcoration is a street, but a, a core and article course tearnismally in any inel in a late." Let a let to be proved to the general result of the street of the late of the late of the late in a solution, evidence have no iver twent to solution. I who has the ire the late of the ascertained by calculation." Of the a number of satherities.

Definite for the former and the free allowed to the Master were not werranted. The easter 'iled tures lite ised at the ments showing the work fore and the several amounts he requested. The first same had a scene we not be as a district of the fact that There are three thans: (1) In . neter derilfied ne had takes ind had reported 344 no we of roweling contains in set follow at 18 certs a folio, for whis we a word ile; the means it is meaner \$1174.05 for ere is infine excision enter included the certificates of organization of the bank, colors to book time a pacement, stock cartificate been at 1787 and for the continue of the series foldo. The being i on the true the following in obtaining the spirit of docenting and recein cours, recently , i. of factions, The Master certifies of court beinder viv same cortists of the outemb, entailed a course for a course outemb, and the course outemb. the oute for isaring of the catemed it ten t. ere ere hearings on frankers Ali Tret days, it is in the incurrence to quired, that 'e montrod munter of larray, the epicahone onlin, et . The occur allowed a fair the a to the arm, or "you The record intimited 1687 in es. in it is the proper sell cordance with the ballion realism a, . (ii. 58, 11. 18 be re

Stats. 1935. We think the amount allowed the Master appears to be entirely warranted by the itemized schedule attached to his report, taken in connection with all the facts in the case. Gottschalk v.

Noves, 225 Ill. 94; Rosenfeld v. Horwich, 221 Ill. App. 304.

The decree of the Circuit court of Cook county is affirmed.

DECREE AFFIRMED.

Matchett, P. J., and AcBurely, J., concur.

State. 1235. We taink too account and state and entirely samesation with a line of the state and a constitution of the state at the state and the state at the st

BEN SIEGEL and SIMON GOLD, doing business as S. & G AUTO FINANCE CO., and MAX PODOLSKY,

Appellees,

V.

MOTOR VEHICLE CASUALTY COMPANY, a corporation,

Appellant.

APPEAL FROM
MUNICIPAL COURT

OF CHICAGO.

287 I.A. 613²

MR. PRESIDING JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of \$800 entered in the Municipal Court in favor of plaintiffs and against the defendant insurance company based upon a policy of insurance on the automobile of Max Podolsky, which was stolen. The cause was tried before a judge and a jury of six men.

Plaintiffs' statement of claim alleges that a policy of insurance was issued by defendant to Max Podolsky on December 12, 1932, covering a Buick automobile, and insuring him against actual loss due to theft, robbery or pilferage; that said policy contained a mortgage clause which also insured the plaintiffs, Ben Siegel and Simon Gold, doing business as S. & G. Auto Finance according to the tenor and effect of said mortgage clause and the policy of insurance; that on December 10, 1932, Ben Siegel and Simon Gold, doing business as S & G Auto Finance Co. became the holders and owners of a chattel mortgage on said automobile and the note secured thereby for the sum of \$924, payable in installments of \$77 per month; that on April 26, 1933, said automobile was stolen; that there is now due and unpaid upon the note and chattel mortgage the sum of \$462, together with interest at 7% per annum from July 10, 1933: that the value of the automobile on the date of its loss was \$1200: that defendant has failed to indemnify plaintiffs for their loss,

SEN SIECEL and SIECE COED, doing business to S. A. G. TUTO FINANCE CO., and LAX POJOLSKY,

TOPELISES,

V.

MOYOF VEHICLE JAJUALTY COMPANY,

S. COTPOTITION,

MR. PRESIDENT JESTICE CARLS .. U.A.1 " .. 145 COPTAINS OF THE CAUCH.

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This is an appeal from a justice of Bharman in the Municipal Court in favor of plaintiffs and adjust the left of insurance company based upon a policy of insurance on the automobile of Max Rodolsky, which was stolen. The cause was tried affects a judge and a jury of six men.

To triffs atmement of close specifications is the contract of insurance was issued by defandent to Mak totalaky on Messier I. 1958, covering a fuick automobile, and incining distance of and loss due to thaft, robbery or Alfernas; that a since to the a mortgage clause which wise insured tom . withing the since is the since when the since is the and Simon Colo, doing business of . A. a seemised gold, clot domine bus To volue. The measure of the hier to dealth bas gones and est insurance; that on December 10, 100, on 100 on 100 on, owners of the the mortge, e condition of the more according to thereby for the sum of \$800, may ble in in . I have a c' ' ler month; that on April 26, 193 , will enturemine a storon; that the is now due and un sid upon the note and ch tial eat, in the size of \$468, together with interest t 7% per manum Tron oury 10, 1 ...; that the value of the automobile on sir ite of ite long me (190); that defendant has failed to indeprify i intiffe for their loga.

In its affidavit of merits the defendant states that the policy of insurance sued upon was issued in consideration of certain warranties made by Max Podolsky; that these warranties were known by the said plaintiff to be false and untrue at the time they were made; that said plaintiff had not purchased a new automobile, but had purchased a used and secondhand automobile; that the representations of the plaintiff in his warranty that he had purchased the car new and at a cost of \$1500 was untrue as he had paid only \$1300 for it; that the policy provided that if any of the warranties were untrue that said policy should become null and void: that the alleged theft described in the policy of insurance did not occurr as alleged in plaintiff's statement of claim or in any other manner and that said automobile was not, in fact, stolen; that said policy provided that within sixty days after any loss the plaintiff should deliver to defendant at its home office in the City of Chicago a written statement, signed and sworn to by him, stating his knowledge and belief as to the date and cause of the loss: that the value of the automobile at the time of the alleged theft was not \$1200, but only \$600 and that the premium of \$69.12 paid by plaintiff on the policy was tendered back,

Max Podolsky, one of the plaintiffs, testified that on December 10, 1932, he purchased a 1932 Buick sedan from the West Side Auto Exchange which was represented to him as a demonstrator; that he paid \$1,385.00 for it; that at that time he traded in a new Ford for which he was allowed \$500 and that he paid \$100 in cash; that the balance was financed; that he took out insurance on the car the same day through a Mr. Russell; that Mr. Russell placed the insurance for him and the policy and the bill for same were from Charles U. Victor & Company; that he paid the \$85 premium on said policy to Mr. Russell; that his car was stolen on April 26, 1933, in Oak Park, Illinois while he was attending a high school

It is affidants of merico bus defen to strabilia att of the policy of insurance qued upon was issued in consideration of certain verranties mede by Mex Fodolsky; that these serrenties were known by the said plaintiff to be it as nd intrue t tae time they were made; that seid plaintiff not nor monesed a new automobile, but had purchased a used and secondhand outorowile; that the representations of the plaintiff to his sarranty that he asd has ed as surface over CCCED to sees at a bas went reo add Leandorug paid only \$1300 for it; that the positor and that it any of the warranties were untrue to t will colloy about become null wold; that the alleged theft described in the rolley of incurrnes ni to mislo to insustate attribuish ni bagalle as truoco ton bib any other manner and that anid automobile are not, in fact, atolen; that said policy provided that within sirty days fiter any loss ai esillo emor eti to tue meleb ot revileb bluede llittinisiq edi the City of Chicago a written statement, signed and erorn to by him, stating his knowledge and belief as to the date and oruse of the loss; that the value of the automobile of the time of the ollered thoft was not '1200, but only \$600 and that the armium of .63.12 paid by plaintiff on the policy was tendered bick,

Max Podolsky, one of the plainting, testified that on December 10, 1952, he purchased a 1833 Buick sedan from the fest gide Auto Exchange which was represented to him as a demonstrator; that he paid \$1,385.00 for it; that at the take he take at in a new Ford for which he was allowed \$500 and that he prid \$100 in pah; that the balance was financed; that he took out insurance on the car the same day through a Mr. Muscell; that are the insurance for him and the policy and the bill for and were from Charles U. Victor & Company; that he mid the E5 premium on said policy to Mr. Muscell; that his car was stending a high school 1955, in Oak Park, Illinois while he was attending a high school

exhibition and that he reported the theft and notified the insurance company.

The evidence shows that the application for the insurance was made over the telephone by Charles U. Victor & Company, brokers, and the policy was made out in the office of the defendant; that when the application was received the counter clerk for the defendant inserted in it that the car was a model 32-67, and that the list price was \$1310; that the counter clerk got that information from The National Used Car Market Report book which insurance companies use and from that hedetermined the model; that the rest of the handwriting was that of Mrs. Victor, who was cashier in the office of Charles U. Victor & Company; that this clerk estimated from the book mentioned that the car was a new car and made out the policy and the premium for the same from the information which he received from this book regarding secondhand cars; that Podolsky had not stated that the automobile was a new one.

The evidence further shows that several months prior to the time Podelsky's automobile was stolen, an oral claim was made under this policy by him for two cushions that were stolen from his car which cushions were valued at \$40 and that the defendant paid the same upon the loss being reported to it; that no affidavit for the loss was required.

Inasmuch as the application for the insurance was not signed by the plaintiffs and was made out at the office of defendant company or its broker under the warranties named in the policy and was relied upon by the defendant, any statements which were erroneously written into the policy by defendant's clerk could not be binding upon the plaintiffs. As stated by our Supreme Court in Hancock v.

Knights of Security, 303 Ill. 66, at page 71:

exhibition and that se reported the theft and noticial the latur no company.

The evidence shows that the qualitation for the insurance was made over the telephone by Chries . Victor & Company, brokers and the policy was made out in the office of the defendant; that when the application was received the counter clerk for the defendant inserted in it that the own was a merici 33-07, and that the list price was 1310; that the counter clerk got that informati from The Mational Used Car Market Tepart Dook which insurance companies use and from that he determines the model; that the rest of the bundariting was that of Mrs. Victor, who was cashier in the office of Charles U. Victor & Company; that this clerk estimate from the book mentioned that the cer was a new or and made out the policy and the premium for the arms from the information which he received from this book regarding secondard data; that Fodolsky had not stated that the automobile was a new one.

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Knights of Security, 303 Ill. 66, at case 71:

"Any statement made by an applicant for insurance which relates to risk, and is declared by the policy, or in another instrument incorporated with it, to be a condition of the insurance, is a warranty."

As we have already stated, no application was signed by the plaintiffs.

It is next contended that the court erred in not granting defendant's motion for a directed verdict. Where there is contradictory evidence, it is the duty of the court to submit the cause to the jury. Grange Mill Co. v. Western Assurance Co., 118 Ill. 396. Under the circumstances the trial court would have been compelled to weigh the evidence had it granted such a motion. Darmody v. Kroger Grocery Co., 362 Ill. 554. In denying this motion the trial court was not in error.

When the defendant paid the prior claim made by Podolsky, when the cushions of the automobile were stolen, it recognized the policy as valid, and as was said in 32 Corpus Juris on page 1315;

"Where a ground exists upon which the company may have the right to avoid or forfeit the policy, it may with knowledge thereof intentionally relinquish its right, or its conduct may justify insured in the belief that it does not intend to take advantage of it; hence, it may be estopped from claiming that the policy is avoided or forfeited if insured acts in reliance upon this belief to his prejudice. The courts being loathe to enforce a forfeiture are prompt to seize upon any circumstances which indicate a waiver on the part of the company, or which will raise an estoppel against it."

It appears that the method of doing business on the part of the defendant was to deliver the policy in question to Charles U. Victor & Company who in turn delivered it to Russell who delivered it to Podolsky. It appears from the evidence that when Podolsky's automobile was stolen he telephoned the defendant's office and notified it of the theft; that he later went to the office of the defendant company and saw a Mr. Hill there and Podolsky signed a statement. The policy provides among other things that proof of loss must be delivered at the home office in Chicago and a written statement signed and sworn to within sixty days. This was not done but no objection

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"Ally at terms and such a paint for instrance which religions to risk, this offer or in rother instrument inter or ind with it, to see condition of the insurance, is a reprenty."

As we have sire dy stated, no appliantion were algued by the theirth

It is most contended that are court error in art grantim

defendent's motion for a directed verdict. Fore there is contradiotory evidence, it is the duty of the court to submit the cure to the jury. Grener Mill Do. v. estern laturated Do., 118 III. 33 Under the airbunstraces the trial sourt mond have been confelled to reigh the evidence bad it granted such a action. Directy v. Kroper Grosery Do., 363 III. 554. In denying this lotion the trial court was not in error.

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was made to the statement and the same was received by the company after the sixty days had expired, which we believe constituted a waiver of this requirement.

Objection is made to certain rulings of the court on the admissibility of evidence, but from an inspection of them we do not find that any reversible error was committed.

Objection is made to certain instructions by the court but after carefully considering them, we do not find that any one of them is prejudicial to the defendant. It appears from the record that no objection was made at the time the instructions were given. Rule 171 of the Municipal Court, provides as follows:

"Objections to the charge must be made before the jury retire and must specifically point out wherein the part objected to is erroneous and the party objecting must indicate clearly the correction therein desired to be made and upon the objections being made the judge may make such corrections as he may deem proper."

The purpose of this rule doubtless is that the jury may be properly instructed as to the law and the court is entitled to the assistance of counsel in making him point out wherein the instructions are erroneous so that the jury may be properly instructed as to the law before they leave the bar of the court. Defendant not having made his objection at the time of the trial, it cannot now be made the basis for an appeal nor an assignment of error as an afterthought.

As to the proof of the loss or theft of plaintiff Podolsky automobile, we think the evidence tends to show that the automobile was stolen and the defendant has failed to maintain its defense that the automobile was not stolen. The burden of proof to establish a misrepresentation or concealment and the falsity and materiality thereof, as well as any fraudulent intent and reliance thereon, rests upon the insurer. Gurley v. Massac County Mutual Relief Assn.

ras made to the statement and the same wes received of the contrary after the sixty days and expired, which we consistuted a waiver of this requirement.

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186 Ill. App. 492; Harrison v. United States Fidelity & Guaranty Co. 255 Ill. App. 263.

As to the amount of the judgment, there was some evidence which tended to show that the value of the automobile at the time of the trial was \$1200 and the evidence of the defendant was that it was worth from \$600 to \$800. In weighing the evidence a jury is particularly well-fitted to determine where the preponderance lies. We cannot say that the verdict was not supported by a preponderance or greater weight of the evidence.

For the reasons herein given the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND MALL, JJ. CONCUR.

186 Ill. App. 492; Barrison v. Unised States Fidelity 5 Surmary to 255 Ill. App. 265.

As to the amount of the judament, there me above evidence which tended to show that the value of the rutomobile at the time of the trial was 41800 and the evidence of the detailant as that it was worth from \$600 to 4800. In weighing the avidence jury is particularly well-fitted to detaraise where the reconference lies. We cannot say that the verdict was not aupported by a prependerance or greater weight of the evidence.

For the reasons berein given the judgment of the summeing

JUDGASHI DEFIRASO.

REBER AND MAIL, JJ. CONCUP.

ROBERT D. MELICK.

Appellee,

APPEAL FROM

MUNICIPAL COURT

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK, a corporation,

Appellant.

OF CHICAGO.

MR. PRESIDING JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment entered in the Municipal Court in favor of the plaintiff, Robert D. Melick, and against the defendant, The Metropolitan Casualty Company of New York, for the sum of \$1,079.20 and costs for failure of defendant to plead over after the court had overruled defendant's written motion to strike plaintiff's statement of claim, and from which defendant appeals.

On November 13, 1935, plaintiff filed his statement of claim, which reads as follows:

That he is the holder of a certain Guaranty issued by the defendant, guarantying the payment of Bond No. 198 for the sum of \$1,000, issued by MIDWEST ATHLETIC CLUB, issued November 1st, 1925 and payable November 1st, 1935, and the sami-annual interest thereon of \$32.50 payable on the respective due dates of May 1st, and November 1st, and default has been made by the issuer thereof of May 1st, 1935, of coupon No. 19 in said sum of \$32.50 and November 1st, 1935 of coupon No. 20, together with said principal sum of \$1,000.00 on said November 1st, 1935, all of which items draw interest after maturity at 7% per annum; that defendant has been notified of said defaults and demand has been made upon the defendant to pay said respective sums, under its contract so to do as follows:

THE METROPOLITAN CASUALTY INSURANCE CO. OF NEW YORK

12513

Chartered 1874 Home Office - 55 Fifth avenue

FOR VALUE RECEIVED, HEREBY GUARANTEES TO THE HOLDER OF THE PRINCIPAL AMOUNT OF THE BOND HEREINAFTER DESCRIBED AND THE PAYMENT OF THE INTEREST COUPONS THERETO ATTACHED, AS THE SAME FALL DUE, UPON THE CONDITION THAT, AT ITS

ROBERT D. MELICK.

Appellee,

To K a Idlauss

THE METROPOLITAN CASUALTY MEURANCE COMPANY OF MEW YORK, a corporation,

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APPEAU FACE

MM. PRESIDING JUSTION DERIG .. SUMMITTED DESCRIPTION THE

GPINION OF THE COURT.

This is an appeal from a judgment entered in the Municipal Court in favor of the plaintiff, hopert C. Filox, and against the defendant, The metropolitan Casualty Comremy of New Yor for the sum of \$1,079.20 and costs for failure of defendant to plead over after the court had overruled defendant's written motion to strike plaintiff's stotement of claim, and from mich helandant .aisscos

On Movember 13, 1935, plaintiff files his stylement of claim, which reads as follows:

"1. That he is the holder of a cert in Gurrary "1. That he is the holder of a cert in Gueraty issued by the defendant, guarantying the organt of Bond No. 198 for the sum of Fi. TO, issued by 'dlo TY ATHLETIC OLUB!, issued November 1st, 1925 and oxyable evenber 1st, 1925, and the smale-annual interest thereon of 3.50 eyels able on the respective due detes of dy 1st, and estable the respective due detes of dy 1st, and ovember 1st, and default has been made by the issuer that of lat, 1935, of coupon No. 19 in said smale TS. 50 and November 1st, 1935 of coupon No. 70, together ith said principal sum of 1,000.00 on axid coverber it, 1935, and all of which items draw interest efter metarity to the annum; that defendant has been motified of said affinite and demend has been made upon the defendant to may acid and desend has been made upon the defendant to may anid respective sums, under its contract so to do s rollo s:

> MATIAD LOSTER SHT CABUALTY IMBURANCE CO.

OF NEW YORK

hartered 1874 Home Office - 55 Mitth avenue

FOR VALUE EXCRIVED, HEREBY MURRIMENS TO 117 (01.0 % OF THE PHINCIPAL MOUNT OF THE BOND IN INATER DESCRIBED AND THE TAYMENT OF THE INTER ST COUPORS THE USTO LITTURY S. AS THE SAME BALL DUR, UPON THE CONDITION THIE, IT ITS

12515

OPTION, IT IS TO BE ALLOWED SIXTY (60) DAYS FROM DATE OF THE MATURITY WITHIN WHICH TO PAY THE PRINCIPAL AMOUNT. BUT WITH INTEREST IN THE MEANTIME AT THE COUPON RATE.

Description of Bond Number 198 - - - Amount - - - \$1,000.00 - - Date of Maturity November 1, 1935, BEING ON OF THE SERIES OF BONDS AGGREGATING \$1,200,000.00 SECURED BY A DEED OF TRUST MADE BY * * MIDWEST ATHLETIC CLUB CORPORATION in Favor of CHICAGO TITLE AND TRUST COMPANY, as Trustee, DATED THE 1st, DAY OF NOWEMBER, 1925, covering property known Midwest Athletic Club = = SIGNED AND DATED THIS 18th day of JANUARY, 1926.

> The Metropolitan Casualty Insurance Company, of New York,

(Corporate Seal)

By L.E. Maccall Vice President

Attest H. M. Clume Assistant Secretary

That there is now due to plaintiff the said principal \$1,000.00
Coupon 19, of May 1st, 1935
Coupon 20, of Nov. st, 1935
Accrued interest at 7% to date
3.86

Making a total so due plaintiff

for which plaintiff sues; defendant having refused to pay as contracted so to do.

Robert D. Melick Attorney, pro se.

Robert D. Melick makes oath and says as follows - he is attorney and plaintiff and has knowledge of the facts related in the foregoing Statement of Claim and the same are true as stated; that there is due from the defendant to the plaintiff, after allowing to the defendant all its just credits, deductions and set-offs, the sum of \$1,068.86 with interest thereon at 7% per annum from November 13, 1935.

Robert D. Melick

Subscribed and Sworn to by said Robert D. Melick, before me this 13th day of November A. D. 1935. Maurice Weissman (SEAL) # Notary Public.

After entering its appearance the defendant made a written motion to strike plaintiff's statement of claim and to dismiss the cause for the following reasons:

The plaintiff in his statement of claim fails to alkee that he is the legal owner of Bond No. 198 of Midwest Athletic Club in the face amount of \$1,000, dated November 1, 1925, due November 1, 1935 and fails to allege that he is the owner of a certain guaranty referred to in his said Statement of Claim, guaranteeing payment of said bond.

OPTION, IT IS TO AS ATA, C P SIMPY (50) DAYS AND A C. A. THE MATERIAL ATA MILUT TO A THE PRINCIPAL AMERICA.

BUT WITH INTEREST IN THE MEANINGS AT THE COUNCE MAY. Description of Sond

Number 138 --- Amount -- 1,000.00 -- Dete of Artrily November 1, 1935, Baind On O THE SARIES OF HORDS AGGREGALING \$1,200,000.00 RECURED BY + DEED A TOPT ATTLETIC CLUB OCHERN TION in about of CRIOAGO TITLE AND THUST COMMANY, as Trustes, 2017 19 19 181, 181 DAY OF MOVEMBER, 1925, covering property known Midgest Athletic Club = = 4 SicWep 210 Defet This leth day of JAMUARY, 1926.

> The Metropoliten C suchty Insurence Company, of new York,

> > by L.k. Jaconil (Corporete Beal)

Attest A. E. Clume Assistant Beersterry

That there is now due to plaintiff the said priscipal 1,000.00

Coupon 19, of May 1st, 1825

Coupon 30, of Nov. st, 1950 tecrest at 75 to date

03.7 Making a total so due plaintiff sues; defendant having refused to pay as contracted so to uo.

Robert D. Melick Attorney, pro se.

32,50

38.50

Robert J. Wellek makes oath and says as felloss - ha is atterney and plaintiff and has knowledge of the facts related in the foregoing Attement of Claim and the Arme age true as atched; that there is due from the fact, that the the plaintiff, after allowing to the defendant all its just oredits, deductions and set-offs, the sum of \$1,068.86 with interest theroon at 7% per annum from Wovember 17, 1875.

> Moifer D. Walion Subscribed and sworn to by oaid Robert D. Melick, before me this lith day of Movember A. O. 1935.

Wenrice Weigesen Wetery Public. (SEAL) "

cause for the following reasons:

as the a rock thring ob set somether, as the grindent total motion to strike plaintiff's strteagnt of clim and to dismiss the

"1. The plaintiff in his state went of old the to singe the the ten state legs of Midwest athietto vius in the free execut of . in. dited November 1, 1985, due hereaber 1, 1985 and this to allege that be is the owner of a certain guaranty referred to in hirs to tustyen privaterruy, misto to insmotate bins eid bond. 2. Even though the plaintiff is the owner of said bond and guaranty, which the defendant does not admit, plaintiff's Statement of Claim herein fails to state a cause of action in that the guaranty upon which said Statement of Chaim is based, which is set forth therein in words and figures, provides that the defendant at its option, (which it hereby elects to exercise without in any way admitting any liability under the terms of said guaranty or waiving any defenses it may have thereto) shall be allowed sixty (60) days from the date of the maturity of the bond within which to pay the principal amount of such bond. The plaintiff's Statement of Claim alleges that said bond became due November 1, 1935, and therefore no cause of action will arise on said guaranty until December 31, 1935.

This was duly verified by defendant's agent who stated that the above and foregoing motion was not filed for the purpose of delay.

On December 12, 1935, plaintiff consented to the defendant filing its motion to strike his statement of claim and a counter motion whereby plaintiff gave notice that he would move that judgment be entered against defendant on disposing of its motion to strike, on the following grounds appearing on the face of the record:

- "(a) Your guarantee is to pay the holder of Bond 198 of the Midwest Athletic Chub of \$1,000 and ecupons-2 for \$32,50 each.
- (b) Your guarantee does not defer the bringing of suit for 60 days,
- (e) Default on its contract after demand authorizes suit.
- (d) Demand having been made for payment by the owner of bond and guarantee, and no notice of deference having then been given as to principal, its 60 day privilege was waived.
- (e) On plaintiff's demand for payment of bond and coupons on November 2nd, 1935, and defendant then not giving notice that it would elect to take 60 days to pay the principal and paying the coupons at such time, may not after suit is brought, on the expiration of 29 days, say as a matter of defense it would elect the provision waived being in default of coupon payments.

Robert D. Melick
Attorney, Pro se."

2. Sven though the pushtiff is the unit of soid bond and guaranty, which the defend at lose not somit, plaintiff's Statement of Oi-im harrin fells to state a cruse of action in that the guaranty much which said Statement of Châim is based, which is set inthe therein in words and figures, provides that the defend at the option, (which it nereby elects to exercise without in any way admitting any liability under the term of said guaranty or waiving any defensed it may have therete) shall be allowed sixty (60) days from the date of the acturity of the bond, which to pay the principal amount of such bond. The histoliff's it tement of Chimalleges that soid bond became due Goverber 1, 10s., and therefore no cause of action will arise on seid guaranty until December 31, 1855."

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- (c) befault on its sontract after demand authorizes suit;
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conset D. Mellok Strormey, iro se. On the same day, December 12, 1935, on motion of the defendant the court ordered that the time to file a statement of defense be extended 10 days.

On December 26, 1935, an order was entered by the court stating that the defendant was in default for want of an affidavit of merits of defense in this cause, and on motion of the plaintiff it was ordered by the court that default be entered herein against said defendant.

Thereafter a notice was served upon Melick, by the attorneys for The Metropolitan Casualty Insurance Co. of New York, stating that they would appear before the court and present defendant's motion to vacate the default entered December 26, 1935, which was supported by an affidavit. The affidavit reads as follows:

"Creighton S. Miller, being first duly sworn, on oath deposes and says that he is one of the attorneys for and agent of The Metropolitan Casualty Insurance Co. of New York, a corporation, defendant in the above and foregoing cause, and duly authorized to make this affidavit for and in its behalf; that due to inadvertence the attorneys for said The Metropolitan Casualty Insurance Co. of New York did not notice in the daily Municipal Court record of Tuesday, December 24, 1935, that the above entitled cause was set for December 26, 1935, and therefore said attorneys did not appear in Court; that said defendant belieges it has a good and meritorious defense to all or part of the statement of claim filed in said cause and desires to argue before the Court its motion to strike on file in the above entitled cause; that in the opinion of said defendant the plaintiff will not be prejudiced by the vacating of said order of default."

The motion to vacate, based on the affidavit, was denied by the trial court and the court thereupon found, as provided by law, that the amount of plaintiff's demand from the defendant after allowing all just credits, deductions and set-offs, is as follows:

"and that this cause is a suit for the recovery of money, and that the defendant herein is in default for having failed to comply with the order of this court entered herein requiring said defendant to file a statement of defense in this cause, it is ordered by the court that default be entered herein against the defendant The

On the same day, December 12, 1965, on motion of the defendant the court ordered that the time to file a statement of defense be extended 10 days.

On December 25, 1935, an order was entered by the court gt-ting that the defendant was in defoult for want of an officiality of marity of defense in this cause, and on methon of the plaintiff it was ordered by the court that defoult be entered acrein a minst said defendant.

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Metropolitan Casualty Insurance Co. of New York, a corporation, for want of such statement of defense.

And as to the damages sustained by the plaintiff herein, the Court heard the evidence contained in the affidavit of plaintiffs claim filed herein, and finds therefrom that there is due to the plaintiff the sum of money shown in said affidavit of claim to be due and assesses the plaintiffs damages at the sum of Ten Hundred Seventy Nine and 20/100 Dollars (\$1079.20)."

The court further found that the plaintiff have and recover of and from the defendant the sum of \$1079.20 together with costs and that execution issue therefor.

It appears from the record before us that the defendant through its neglect failed to file an affidavit of defense as provided by law and now seeks to make a distinction between the "holder" of a bond and the "legal holder". The terms "holder", "Owner", and "bearer" in commercial parlance are well understood and, presumptively at least, give to such possessor of the security the right to exercise ownership over it, and we do not think there is, in the meaning of the words, any distinction between "owners and "legal owners in so far as the legal rights of the parties in the case are concerned.

It is contended by the defendant that the term of the guarantee by which it is to be allowed sixty days from the date of the maturity, within which to pay the principal amount, makes the commencement of a suit before the expiration of that time premature. In its affidavit of defense which was stricken, in speaking of the option, it states that it hereby elects to exercise the same without in any way admitting any liability or waiving any defense it may have thereto. The terms of the guarantee state that they should have sixty days in which to pay the money and the defendant does not ask that it be given the privilege of paying it within sixty days, but, on the contrary, it states that it elects to exercise the option without in any way admitting any liability under the terms of said guarantee. In other words, that even though they were given sixty

Metropolitun Creenty Insurance Co. of Asa furt, corporation, for want of such at terent of actonse. And as to the damages sustaized by the Ariant herein, the dourt heard the critonee contained in the sifidavit of plaintiffs alaim filed herein, and finis therefrom that there is due to the Ariatiof the amount of money shown in asid affidavit of claim to be one and assesses the plaintiffs drawers at the sum of mondad Seventy Nine and Safety Souling (1978-30).

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It is contended by the defendent that the term of the guerantee by which it is to be allowed sixty days from the letter of the laturity, within which to pay the principal the letter, where the commencement of a suit before the engine that it is affidevit of as sunce which was strick to the lates affidevit of as sunce which was strick to the lates affidevit of as sunce which we strick to the lates that it strices that it needs acceptantly of the lates of the cony way admitting any liability or waiting the that they should not have therefore. The terms of the instructor state that they should not that it be given the privilege of cying it within sixty days, but, on the contrary, it states that it elects to exercise the rice without in any may admitting by it billity under the terms of the guarantee. In other cords, that even though they have alrey

days additional time they did not intend to pay it at that time. If the makers of this guarantee had intended that they were to be given sixty days after the same became due, before commencing suit, it would have been a very easy matter for them to use the proper language giving them that added time. But, inasmuch as the defendant after demand is made does not choose to exercise the option or election as provided in the contract, he cannot now complain of his own action.

The judgment having been entered because of the default of the defendant in not filing an affidavit of defense when the case was reached for trial, and setting up no facts in its affidavit which would constitute a reason for vacating the said default, we are of the opinion that the Municipal Court properly denied the motion to vacate the default and properly entered the judgment for the plaintiff.

For the reasonsherein given the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND HALL, JJ. CONCUR.

days additional time they did not which to my at or the base of the makers of this measures had intended that way were obesitiven sixty days after the came because we, before cover oing suit, it would have been a very easy matter for them to men the proper language giving from that coied time. It, in almost the defendant after demand is aske does not choose to excrete the option or election as revised an true complain of his own coien.

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JUDGUCT THEFT I

HEBLIA AND HALL, JJ. OF BOLL .

THE PEOPLE OF THE STATE OF ILLINOIS,

Appellant,

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FRANK BUDASI,

Appellee.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

2871.A. 613

MR. PRESIDING JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

This case has been consolidated with case No. 38815, entitled, The People of the State of Illinois v. Frank Budasi, in which case we have today filed an opinion and the law applicable in that case is controlling here.

The judgment of the Municipal Court finding the defendant not guilty and discharging said defendant is hereby reversed and the cause is remanded for a new trial with directions to that court to strike the petition of the defendant and vacate and set aside the order setting aside the previous order of conviction and enter an order remanding the defendant to the custody of the Superintendent of the House of Correction to complete his sentence and enter such other orders as may be necessary which are not inconsistent with the views herein expressed.

JUDGMENT REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

HEBEL AND HALL, JJ. CONCUR.

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WIRING OF I COUNTY

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ROBERT PRUITT.

Appellee,

V.

ADOLPH STAUDENRAUS,

Appellant.

APPEAL FROM

COOK COUNTY.

287 I.A. 614

MR. PRESIDING JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment entered in the Circuit Court in favor of plaintiff, Robert Fruitt, for the sum of \$5,350.00, being the amount alleged by plaintiff to be due on a contract for the sale of stock in the corporation known as the Adolph Market Company of which $53\frac{1}{2}$ shares of the capital stock, it is claimed was purchased by the defendant, Adolph Staudenraus, from the plaintiff at \$100 a share, but has not been paid for.

The declaration alleges a written contract between plaintiff and defendant as of May 1, 1929, wherein it is alleged that plaintiff was the owner of 53½ shares of the capital stock of the Adolph Market Company, valued at \$100 per share and desired to sell the same to the defendant; that defendant agreed to purchase the 53½ shares of the said stock at \$100 per share and to pay therefor the sum of \$5350.00, \$1,000.00 at the time of signing the contract and the balance of \$4350.00 to be paid in monthly installments of \$100 each beginning June 15, 1929, and continuing each month until fully paid; that the plaintiff Pruitt had endorsed the certificates of stock in blank and it was agreed between the parties that said capital stock certificates so endorsed were to be deposited in escrow with the Old Dearborn State Bank until the balance of \$4350.00 was paid to Pruitt; that upon presentation of

ROBERT PRULLE,

Appelee,

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ADOLPH STAUDAN LAUS.

Appellant.

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287 I.A. 614

OPINION OF THE SCHOOL SELECTION OF THE SCHOOL OF THE SCHOO

This is an appeal from a judyment entered in the Directit Court in favor of plaintiff, Pobert Pruits, for the sum of E.Z.D.D being the amount alleged by plaintiff to te day on a constrot for the sale of atock in the corpor tion known as the Rock erriet Company of which 53½ shares of the arcital stood, it is allowed was purchased by the defendant, Idolph Standenrous, from the plaintiff at \$100 a share, but has not been said for.

The declar tion alleges arithen contract esteen plaintiff and defendant as of kay 1, 1309, wherein it is alleged that plaintiff was the owner of 50% abres of the sent 1 knook of the Adolph Market Jongsany, valued at 410) or share to desired to sell the same to the defendant; that defaurant are no desired to archive the 53% aberes of the said steek to alway for an actual to archive therefor the sum of \$550.00, 1,000.00 at the arm of algorithm the contract and the balance of 4850, to be arranged in abriliants of 100 each beginning June 10, 1309, and annihi in a said that the armitistic armitistic and the certificates of stock in blank as it and armitistic and parties that end of pitcal stock certificates. The armitistic are and be deposited in escrew with the armitistic are are at the balance of \$4350.00 was unid to armitist that are are not that the

receipts or other evidence showing payment of said sum, or upon the signed order of Pruitt the stock was to be delivered to Staudenraus.

It appears from the evidence that while said stock was being held by the bank, by some prior arrangement the purpose of which is not clear from the evidence, the defendant Straudenraus entered into a written contract with plaintiff whereby the defendant did agree to purchase said $53\frac{1}{2}$ shares of the stock from the plaintiff for the sum of \$5,350.00 to be paid for as follows:

"One Thousand Dollars (\$1,000,00) to be paid upon the signing of the contract, One Hundred Dollars (\$100.00) on the fifteenth (15th) day of June, 1929, and One Hundred Dollars (\$100.00) on the fifteenth (15th) day of each and every month thereafter until paid."

The defendant contends by his plea and affidavit of merits that when the said document set up in plaintiff's declaration was signed by the defendant, the defendant informed the plaintiff and the plaintiff agreed and consented thereto; that the signing of the same was conditional upon defendant's right to enter into such agreement and that he would advise the plaintiff the following morning if said agreement was not in conflict with a prior agreement between the stockholders of the Adolph Market Company and the defendant; that the morning following the signing of the document defendant notified the plaintiff that he could not go through with the transaction because it was in violation of a prior written agreement between the stockholders of said company; that defendant has never had possession or control of the said shares of stock and admits that he has not paid any part of the money as specified in the alleged agreement and does not owe the same because of the fact that said contract was not completely executed, was only signed and was not to become binding until the defendant informed the plaintiff if it would not be in conflict with said contract between

receipts or other evidence shoring payment of mid end, or upon the signed order of graitt the stock was to be delivered to trubourous.

It appears from the evidence that while grid stock was being held by the bank, by some prior arrangement the purpose of which is not clear from the evidence, the defendent itravience is entered into a written contract with plaintiff whereby the defendent art did agree to purchase said 52% shares of the stock are the pullar;

"One Thousand Bollars (\$1,300.00) to be said uron the signing of the contract, one "undeed Bollars (100.00) on the fifteenth (15th) day of June, 1939, and One Funired Bollars (\$100.00) on the fifteenth (loth) day of each and every menth thereafter until paid."

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the said stockholders of said company; that no amount ever became due to the plaintiff from the defendant upon said contract.

The contract in full reads as follows:

"THIS AGREEMENT made and entered into by and between ADOLPH STAUDENRAUS of Chicago, Cook County, Illinois, party of the first part, and ROBERT PRUITT of Chicago, Cook County, Illinois, party of the second part,

WITNESSETH:

Whereas, the party of the second part is the owner of fifty three and one-half (53g) shares of the capital stock of the Adolph Market Company, a corporation, of the par value of One hundred (\$100.00) dollars per share, and desired to sell the same to said party of the first part and the party of the first part desired to purchase the same on the terms and conditions hereinafter set forth.

NOW THEREFORE, for and in consideration of the premises

the parties hereto agree as follows:

FIRST: The party of the second part does hereby sell and the party of the first part does hereby buy said fifty-three and one-half (53½) shares of the capital stock of the Adolph Market Company and the party of the first part agrees to pay therefor the sum of Fifty-three hundred fifty (\$5350.00) dollars; said payments to be made as follows: One thousand (\$1,000.00) dollars to be paid on the signing of this contract, the receipt whereof is hereby acknowledged, and the balance to-wit: the sum of Forty-three hundred Fifty dollars (\$4350.00) to be paid as follows: One hundred (\$100.00) dollars on the 15th day of June, A. D. 1929, and One hundred (\$100.00) dollars on the 15th day of each and every month thereafter until the total amount of said Forty-three hundred fifty (\$4350.00) dollars is fully paid.

ESCOND: Said party of the second part has endorsed the certificates representing the said fifty three and one-half (53½) shares of the capital stock of the Adolph Market Company in blank and it is hereby understood by and between the parties hereto that said capital stock certificates so endorsed in blank are hereby deposited in escrow with the "Old Dearborn State Bank" as escrowee, to be held by said escrowee until the entire amount of Forty three hundred Fifty dollars (\$4350.00) is paid to said Party of the second part and the said escrowee is hereby directed to hold said certificates until said sum of Forty three hundred Fifty dollars (\$4350.00) is fully paid and said escrowee is hereby directed to deliver the said certificates totaling fifty three and one-half (53½) shares of said stock to the party of the first part upon the presentation by said party of the first or other evidence showing the payment of said sum of Forty three hundred fifty (\$4350.00) dollars or upon the signed order of said party of the second part.

THIRD: The party of the first part shall have the right to pay at any time all the balance remaining unpaid or any amount thereof in excess of said monthly installments stipu-

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the parties hereto agree on follors:

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part. The rty of the . I. and to yet on't they were The ser pro un Pringe . The but The but fix amin Aut to And of -must star fine the reservent is a lo eservent thereof the .bateI FOURTH: It is further understood and agreed by and between the parties hereto that in the event that said Adolph Market Company shall sell its leasehold interest in the building now occupied by it at the North east corner of Lake and State Street, Chicago, Illinois, at any time prior to and including May 1st, 1932, then and in that event the party of the second part shall receive in addition to said sum of Fifty three hundred fifty (\$5350.00) dollars hereinabove referred to a pro rata share in the distribution of the proceeds from said leasehold sale, if any, after the payment of all indebtedness; said pro rata to be computed on the basis of fifty three and one-half (53½) shares to five hundred (500) shares now outstanding.

FIRTH: This contract shall be binding upon the heirs, administrators, executors and assigns of the parties

hereto

IN WITNESS WHEREOF the said parties have hereto affixed their hands and seals this 1st day of May, A. D. 1929.

Adolph Staudenraus (SEAL)
Robert Pruitt (SEAL)

it is difficult to determine the theory of either side in this case. At the time of the trial nothing was said about the delivery of the stock, which is the consideration and the subject-matter for the payment of the money. According to the evidence, as near as we can fathom, the stock is still being held by the bank as collateral for a loan. The evidence indicates that the certificates of stock were offered in evidence at the time of the trial, but we have searched the record and have been unable to find them. The contract offered in evidence by plaintiff acknowledges receipt of the payment of \$1,000.00 but nothing is said in this court by either side concerning the same.

No reason is offered why the defendant Staudenraus should not pay his obligation. He signed the contract and delivered it to the other side and, as before stated, the briefs and abstract do not give us any information as to the rest of the transaction. The court instructed the jury orally, in accordance with an agreement of all the parties concerned, and the record further shows that both

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it is difficult to determine the theory of enters size or only some time of the trial mothing was wrid sout the subject-mote and story, which is the consider bion and the subject-mote and an instance payment of the meney. According to the subject-mote and of the story is actiful being read or the orders column is a loan. The story is the time of the subject of source and are been coshed to the following the record and are been coshed to indicate the subject in evidence by plaintiff or ordered as receif to the stance of the stanc

We recase is offered why the electric of the end of the not pry his oblication. The aigned of the condition of the other side and, in the condition of the other side and, in the condition of th

\$1,000.00 but nothing is sold to his court by suturn side cordernar

parties were satisfied with the instructions and offered no suggestions to the court as to any error that he might have committed. Consequently, they are precluded from now raising such question in this court.

Finding no reversible error in the trial of the cause the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND HALL, JJ. CONCUR.

parties were satisfied with the instructions as a rate of as suggestions to the court s to any error to the might over the Consecuently, they are precluded from now relain such agent, this court.

Finding no reversible error in the brist a fix a use the judgment of the Circuit Vourt is efficact.

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HEBLE AND ANDIAL, JJ. CONCUP.

38513

THE FIRST NATIONAL BANK OF CAICAGO, as Trustee,

Appellee,

V.

VITO MARZANO, et al.,

On Appeal of PETER MARZANO, Administrator DE BONIS NON with the Will Annexed of the Estate of CATHERINE MARZANO, Deceased,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

287 I.A. 6142

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

By this appeal Peter Marzano, Administrator de bonis non with the will annexed of the estate of Catherine Marzano, deceased, seeks the reversal of a decree entered on July 12th, 1935, in a foreclosure proceeding brought by the First National Bank of Chicago, as trustee, against Vito Marzano, Catherine Marzano and others.

The trust deed in question is dated July 31st, 1926, and was executed by Hovakim B. Shekerjian and Anna Shekerjian, his wife, and conveyed to the trustee certain real estate described therein, and was given to secure the payment of a bond issue, evidencing a debt of \$77,500.00. The decree appealed from contains the usual findings and provisions ordinarily contained in a foreclosure decree of this character. In addition, the decree finds, as alleged in the bill filed in the cause, that Catherine Marzano, in her lifetime, personally assumed and agreed to pay the indebtedness secured by the trust deed, and directs that in the event the premises are not sold for a sufficient amount to pay the debt found to be due by the decree, that a deficiency decree be entered against Peter Marzano, administrator de bonis non with the will annexed of the estate of Catherine Marzano, deceased, for any

38513

THE FIRST NATIONAL BANK OF OFFICEO.

.V

VITO MARZANO, et al.,

On Appeal of PETER MARRABO, Administrator DE BONIS HON with the VILL Annexed of the Estate of CATHERIAL MARRANO, Deceased,

Appellant.

Arraha 196.

Del Truckis

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287 I.A. 614

MR. JUSTICE HALL DELIVERED I & DURING N. DA DON'T.

By this appeal Peter Marsano, Administrator <u>de bonis non</u> with the will annexed of the cetate of 3 therine Agreeno, deceased, seeks the reversal of a decree entered on July 18th, 1 35, in a forcelosure proceeding brought by the First Antional on of Chicago, as trustee, against Vito Agreeno, Jatherine Agreeno and others.

The trust deed in question is a test July Elst, 1981, and was executed by Hovskim 3. Shekerjian and Anna Shekerjian, his wife and conveyed to the trustee certain real estate described therein, and was given to secure the payment of a bend issue, evidencing a debt of \$77,500.00. The decree a selled from contains the usual findings and provisions ordinarily contained in a foreclosure decree of this character. In addition, the decree finds, as alleged in the bill filed in the cause, that a therine Marzano, in her lifetime, personally assumed and agreed to sy the indebtedness secured by the trust deed, and directs that in the event the premises are not sold for a sufficient amount to say the debt found to be due by the decree, that a deficiency leaves be antered against Peter Marzeno, alministrator do bonis nor with the will amnexed of the estate of Catherine warseno, decreed for an

deficiency found to be due the complainant after the confirmation of the master's report of sale and distribution. The decree was entered upon a report of a master in chancery of the Circuit Court of Cook County. The trustee named in the trust deed is the First Trust & Savings Bank. However, the record shows that the First National Bank of Chicago, complainant, has by virtue of merger and consolidation, and by appropriate action, become successor trustee to the trustee named in the trust deed.

The record indicates that subsequent to the recording of the trust deed in question, and on March 1st, 1928, Hovakim B. Skekerjian and his wife, Anna Shekerjian, by warranty deed, conveyed the premises to one Grant M. Rhode; that on May 15th, 1938, Rhode conveyed the premises to James M. Hillcoat and Tillie Hillcoat, his wife. who, on June 27th, 1929, conveyed by warranty deed to Charles F. Krieter and Marie Krieter. All these conveyances were filed for record in the office of the Recorder of Cook County, and in none of them is there any statement or recital to the effect that the grantees therein agreed to assume and pay the indebtedness secured by the trust deed. On February 7th, 1930, an agreement was entered into by and between Vito Marzano and Catherine Marzano, his wife, and Charles F. Krieter and Marie Krieter, his wife, wherein and whereby it was agreed that the Marzanos would convey to the Krieters certain premises not involved in this proceeding, and that the Krieters would convey to the Marzanos the premises here involved, subject, among other things, to an unpaid balance of \$71,500.00, secured by the trust deed already referred to. This contract recites in detail the amounts and due dates of the various unpaid balances. By this contract, in addition to the provision for the exchange of properties, the Marzanos agreed to pay to the Krieters the sum of \$18,700.00 in cash. It is further recited

deficiency found to be due the complainent offer the condition of the master's report of sele and distribution. The secret wis entered upon a report of a master in parasety of the direct court of Gook County. The trustee named in the trust deed is the direct trust & Savings Bank. However, the record above that the direct materials bank of Chicago, compleinent, here by virtue of merger and consolidation, and by appropriate action, madem appressor trustee to the trustee named in the trust deed.

The record indiother that subsergant to the recording of the trust deed in question, and on Merch Lat, 1822, Hovekim H. Smekerjian and his wife, Anna Shekerjian, by warranty deed, convey the promises to one Grant M. Rhede; that on May 15th, 1828, bode conveyed the premises to Jemes M. Hilloost and Fillis Hilloost, lite wife, who, on June 27th, 1929, cunveyed by warrenty leed to the rice F. Krieter and Marie Krieter. All these conveyances were filed for record in the office of the Asporder or Jook Jounts, and in none of them is there any statement or recital to the effect that the grantees therein agreed to assume and may the indebtedness secured by the trust deed. On February 7th, 1830, an egreenet was entered into by and between Vito Maragno and Actionias Maragne, his wife, and Charles F. Krister and Wrie Erichar, and alle, wherein and whereby it was agreed that the k rayage would convey to the Arieters certain produces not involved in this corectin, rad sociater, and sociation and of yearon bloom stateful add took bus involved, subject, among other taings, to an uncet to the cor 871,500.00, secured by the trust deed already referred to. This contract resites in devil the energy and due dates of the v view unpaid balances. By this contract, in cuttien to the trevision for the exchange of properties, the warsenes preed to bry to the Krieters the num of \$18,700.00 is cosh. It is further resited that the consideration for the entering into the contract, is
the exchange of these properties upon the terms above mentioned
and "the sum of \$10.00 and other good and valuable consideration".

On February 7th, 1930, the Krieters executed and delivered to Vito Marzano and Catherine Marzano a warranty deed to the premises in question in joint tenancy. This deed contains the following recital:

"This deed is given subject to taxes levied after the year 1927, and subject also to a trust deed dated July 31, 1926, recorded as Doc. 9368567, to First Trust & Savings Bank securing an unpaid balance of bonds aggregating Seventy One Thousand Five Hundred (\$71,500.00) Dollars which said second parties assume and agree to pay."

The bill to foreclose was filed on November 21st, 1932, and alleges, among other things, the execution and delivery of the deed to the premises by the Krieters to the Marzanos, their acceptance of the deed, and as already suggested, an allegation to the effect that the Marzanos thereby assume, agreed to pay, and became liable for the debt. The Marzanos were served with summons in the foreclosure suit on December 1st, 1932, and on March 21st, 1933, a default order was entered against them for want of an answer. On this last mentioned date the cause was referred to a master in chancery to hear proofs as to the allegations in the bill, and on April 10th, 1933, the master's report was made, which recites that upon proof taken and received by him, the complainant in the bill was entitled to the relief prayed, and the master made a finding to the effect that by the acceptance of the deed hereinbefore referred to by which the Marzanos acquired title to the premises in question. the Marzanos assumed and agreed to pay the mortgage debt, and were personally liable for any deficiency.

Subsequent to the report of the master made on May 22nd, 1933, both of the Marzanos died - Vito died in August, 1933, and Catherine in September, 1933. By reason of the fact that the

that the consideration for the entering into the contract, is the exchange of these properties upon the terms above sentioned and "the sum of \$10.00 and other good and velocite consideration".

On February 7th, 1880, the Aristers executed and delivered to Vito Marzano and Obthering Marzano a narranty deed to the premises in question in joint tenency. This deed contains the following recital:

"This deed is given subject to taxes levied after the year 1977, and subject also to a trust coldated July 31, 1926, recorded as 9cc. 9368557, to first Trust & Savings Bank scouring an unanit bollence of condsaggregating deventy One Thousand Five Hundred (771,501.00) Dollers which and second partice assume and agree to pay."

The bill to foreologe was filed on Hovember Plat, 1932, and alleges, among other things, the execution and derivery of the deed to the premises by the Eristers to the Marsanon, their acceptance of the deed, and as already suggested, an alleg tion to the effect that the daraance thereby assure, agreed to use, and became liable for the debt. The Entrance were served with sumpons in the foreclosure suit on december lat, 1972, and on A-ron Slat, is to the the code on the contract tentral the first of a answer. On this lost mentioned date the came a referred to mester in chancery to hear proofs as to the aller time in the bill, and on April 19th, 1933, the adequate record was now, which madites that upon proof taken and received by him, the committeet in the bill was entitled to the relief or yed, and the retar were a finding to the effect that by the wavephance of the deed nevernative orders to by which the Marsance required title to the chiar in question, the Marxanes assumed and agreed to pay the north pe nebt, and were personally liable for any deficiency.

Subsequent to the report of the mater and on my and 1932, both of the Marsanos died - wite died in Aprent, 1935, and Catherine in September, 1932. By reason of the fact that the

Marzanos held the title in joint tenancy, upon the death of Vito, the title became vested in Catherine. On November 17th, 1933, an amended and supplemental bill was filed by the complainant, wherein the death of the Marzanos was alleged, together with the fact of the appointment of Joseph Marzano, as executor of the last will and testament of Catherine Marzano, deceased, and this amended and supplemental bill makes Joseph Marzano and the heirs or devisees of Catherine Marzano, parties defendant to the bill. Joseph Marzano was duly served with summons, but filed no answer to the bill. He died on December 21st, 1933.

On January 6th, 1934, Peter Marzano, defendant here, who theretofore had been appointed administrator de bonis non with the will annexed of Catherine Marzano, deceased, together with the devisees under her will, filed answers to the bill of complaint, as amended, by Monahan & Monahan, their solicitors, and who are also solicitors for defendant here, in which there is no denial of the fact that when the Marzanos acquired title to the premises in question from the Krieters, they assumed and agreed to pay the debt. Thereafter, on January 29th, 1934, the cause was again referred to the master for a hearing on the amended bill and answer filed, and on March 39th, 1934, a hearing was had before the master on the amended bill and answer of Peter Marzano. On May 18th. 1934. the master made a supplemental report, wherein he approved and ratified all the findings made in the original report dated May 22nd. 1933, and the record shows that thereafter notice of this report was given to all the parties in the case, and that no objections were filed thereto. On June 9th, 1934, pursuant to a written notice given to the parties defendant, the plaintiff appeared in court, presented the master's report, and asked that an order be entered approving the report, and that a decree of sale be entered in conformity therewith. On that date the court entered an order,

Marzanos held the titte in joint tenancy, upon the destroat the the title became vested in Satherine. On Lovester 17th, 1557, an amended and supplemental bill was filled by the constituent, wherein the death of the warsanos was alleged, together with the fact of the appointment of Joseph Warsano, as expontor of the last will and testament of Jatherine Marzano, decayed, and this smended and supplemental bill makes Joseph warrano and the heirs or devisees of Ostherine Warsano, parties defendant to the bill. Joseph Warsano was duly served with summons, but liled no ansare to the bill.

On January 6th, 1934, Pater in mano, defendent ere, who theretofore had been appointed administrator de benis per with the will annexed of Ortherine Morrano, deceased, tegether with the devisees under her will, filled chawers to the bill of complitht as smended, by Monahan a mon han, their solicitors, and sho are Let 19 an el erent moins de sent mere de la lette de l of the fact that when the Marsans somered title to the .re-tees in question from the Erictors, they assumed and agreed to by the Thereafter, on January 39th, 1384, the cours are cain refer to the master for a bearing on the nender hill and answer files, and on March 29th, 1934, a hearing was to before the matter on the amended bill and ensure of Fiter derseno. (Fig. 18th, 1814, the master ande a supplemental report, "harein as a raveu and restricted all the findings made in the original rout dated day and 1935, and the record shows that thereafter nutles of this report was given to all the parties in the case, and that no objections were filed thereto. On June Sth, 1934, aresent to a written notic given to the parties defendent, the (1). It has no red in east, presented the master's rourt, and shed that an order or entered approving the report, and that a cures of well in conformity therewith. On that date the rout entered an order, continuing the cause to June 11th, 1934. On June 11th, 1934, the date to which the motion above referred to was continued, the court entered the following order:

"This cause again coming on to be heard on complainant's motion for Yeave to file the Master's report
and supplemental report herein, and for the entry of a
decree in conformity therewith, and on due notice, and
the Court being fully advised in the premises, It is
therefore ordered that leave be and leave is hereby given
complainant to file the Master's Report and Supplemental
report herein instanter, together with all exhibits
herein. It is further ordered that complainant's motion
for the entry of a decree as aforesaid be and the same
is hereby continued generally."

On June 11th, 1934, the date of this last mentioned order, Peter Marzano, as administrator de bonis non with the will annexed of Catherine Marzano, deceased, filed his petition in which he sought to have the entire cause reppened, and that leave be given him to present proofs on the question of the personal liability of Catherine Marzano, deceased, or of Peter Marzano, as administrator as aforesaid. To this petition a denurrer was filed, together with a motion to strike the petition, which motion was denied. On July 10th, 1934, the court entered an order to the effect that this petition stand as an amendment to the answer of the defendants here, and that the cause be referred to the master for the sole purpose of determining whether or not Catherine Marzano, or her estate, were liable to pay the debt mentioned. After hearing proofs, the master found the facts with reference to the question herein involved, and reported the same to the court together with his recommendations, which report is in part, as follows:

"That an exchange of properties was made in March, 1930, between Charles Krieter and wife, and the defendants, Vito and Catherine Marzano; that the transaction for the exchange of said property (which included the conveyance of the premises herein to the Marzanos) was consummated at the Novak-Steiskal Bank; that said Krieters, grantors in said deed, delivered the same to Vito Marzano; that Catherine

continuing the cause to June 11th, 1834. On June 11th, 1934, the date to which the motion above referred to was continued, the court entered the following order:

"This cause a sin coaing on to be aserd on complainant's motion for Yeave to file the a ster's report and supplemental raport berein, and for the entry of a degree in conformity therewith, and on due notice, and the Court being fully advised in the premises, it is therefore ordered that leave be and is we as hereby given complainant to file the Master's Seport and Subjectmental report herein instanter, together with all exhibits herein. It is further ordered that complainent's rotion for the entry of a decree as aforesaid he and the same is hereby continued generally."

On June 11th, 1934, the date of this last mentioned order Peter Marzano, as administrator de bonis non sith the will annered of Catherine Marzano, deceased, filed his vetition in which as sought to have the entire cause reppened, and that leave he given a to present proofs on the question of the personal ii blaity of Catherine Marzano, deceased, or of icter Forano, we wantingtrate as aforesaid. To this octition a decurrer was filled, to other with a motion to strike the petition, which motion was desira. On July 10th, 1934, the court entered an order to the effect that this petition stand as an amendment to the ensurer of the de tricks ners and that the cause be referred to the mater for the sale arreas of determining whether or not datherine wereand, or her eat te, were liable to pay the debt sentioned. After hearing would, the wester found the facts with reference to the culation her in involve, and reported the same to the court together with his recovered thous, which report is in part, as follows:

"That an exchange of properties we made in wrth, 1950, between Charles Krieter and wife, and the defendants, Vito and Catherine Marzeno; that the transaction for the archange of said property (which included the conveyance of the premises herein to the Marzanos) are consumeted at the Movak-Steiskal Benk; that said krieters, granters in actideed, delivered the same to Vito Marzano; that octorine

Marzano was present in the bank at said time, but not in the room where the delivery was made; that Vito Marzano, however, acted in said transaction as her duly authorized agent, and after the execution and delivery of said deed, the Marzanos took possession of the premises described therein.

That the Marzanos were represented at said time in the transactions for the exchange by Mr. Novak or Mr. Steiskal, each of whom was an official of said bank; that a so-called closing statement was present at said time when the exchange of said property was consummated. and a copy of said instruments in writing delivered to Mr. Blake, the attorneys for the Krieters, and a copy was delivered to said Novak or Steiskal, as the representatives of the Marzanos, and thereafter retained in the files of said bank; that said statement is dated March 4, 1930, bears the name Vito Marzano at the top, and contains certain figures and provisions evidencing that the purchase price of the premises herein was fixed at the sum of \$90,200.00, and that (after allowing for certain other deductions and adjustments) the sum of \$71,500.00 representing the unpaid balance of the indebtedness secured by the Trust Deed herein, was deducted from said purchase price: that said deduction from said purchase price is preceded by the following notation on said closing statement 'By first mortgage issue assumed.

That the unpaid balance of the indebtedness secured by the Trust Deed herein was deducted by the Marzanos from the purchase price which they paid to the grantors of said premises, and that a sufficient sum of money to discharge said debt was deducted from said purchase price and retained by the Marzanos for the purpose of paying the indebtedness.

That thereafter Viso Marzano acted as the duly authorized agent of his wife, in managing and collecting the income from the premises; that she left the management of said property to his care and supervision; that he applied the income from the premises toward the payment of interest and principal on the indebtedness secured by said Trust Deed; that after they received title to said premises under said deed, bonds 13 to 18 both inclusive each in the sum of \$500.00 secured by the Trust Deed herein, matured on August 1, 1930, and were duly paid and cancelled; that interest matured on August 1, 1930, and February 1, 1931, after they secured title to said premises, and were duly paid and cancelled; that the defendants, Peter Marzano, et al., admit in their petition of June 10, 1934, that Vito Marzano collected the income from the premises and applied the same in payment of interest and principal on the debt, and that said acts in collecting income from said premises and making payment therewith in reduction of the debt secured by the Trust Deed were authorized by and binding upon Catherine Marzano.

That on November 30, 1932, the Marzanos executed an instrument in writing agreeing that the First Union Trust and Savings Bank, as Trustee under the Trust Deed, could forthwith take possession of the premises to avoid the court receivership, and on November 30, 1932, as a part of the same transaction, the First Union Trust and Savings Bank, as Trustee, executed a notice to the tenants in the building claiming the rents, and attached

Marzano recorded in the the state in the room where the delivery is an e; that Tito as land, however, soted in a id trans of an as her duly witheriesd spent, and efter the execution and lelivery of said deed, the Barranos took one waten of the premises is correct therein.

That the Marzanca acre represented it and time in the transactions for the exchange by er. Rotak or er. Steiskal, each of mbom mes am official of amid bank; that a sc-called closing statement was resent at each time when the exchange of said reporty mes consummate, and a copy of said instruments in writing delivered to was delivered to said kerneys for the Aristars, and a copy was delivered to said kerneys for the Aristars, and a copy sentatives of the warrance, and thereafter retained in the files of said bank; that said atherent is dated kerch 4, 1970, bears the mame Vito Marzanc at the top, and contains of the oremises herein was fixed at the purchast price of the oremises herein was fixed at the sum of 200,000, and that (after allowing for certain ether deductions and adjustments) the sum of 7/1,500,00 repredeductions and adjustments) the sum of 7/1,500,00 repredeductions and deduction from said purchase price; the fruet Deed herein, was deducted from said ourchase price; the following not tion on said cusent 18y first the following not tion on said closing at tecent 18y first mortgage issue assumed.

That the unpoid belance of the indebtedness secured by the Trust Deed berein was deducted by the Marsauge from the purchase price which they paid to the premises, and that a sufficient sum of noney to disphare said debt was deducted from said buroness orice and retained by the Marsauge for the purpose of naying the indebtedness.

That thereefter Vito Marzano soted as the July anthorized agent of his wife, in managing and collecting the Ladome
from the premises; that she left the chage and of said arroser
to his care and supervision; that he mayed the income row
the premises toward the payment of interest and sindictal on
the indebtedness secured by and Trust Deed; that after they
received title to said premises under said deel, conds 18 to
18 both inclusive each in the sum of 1800.00 secured by the
Trust Deed herein, matured on agust 1, 1837, and rowe buly
paid and cancelled; that interest intured on August 1, 1810,
and February 1, 1831, after they secured title to said premises, and were duly usid and concelled; that the defendants,
ises, and were duly usid and concelled; that the defendants,
1834, that Vito Marzano ocliected the incres from the remises
and applied the same in covered the incres from the remises
and applied the same in covered the incres of interest of
the debt, and that a ld sots in collecting income from said
premises and making reyment theresith in reportion of the
debt secured by the Trust Deed were outher income of the

That on sovember 30, 1832, the Moresnos executed an instrument in writing agreeing that the First Union Trust and Savings Bank, as Trustee under the Trust Des , could forthwith take possession of the premises to avoid the court receivership, and on Movember 30, 1932, as a part of the erme transaction, the First Union Trust and Davings Bank, as Trustee, executed a notice to the teasure in the omilding claising the vente, and stached

to said notice was a written consent of the Marzanos theretol

That the execution of said instruments by the Marzanos, by the terms of which they agreed that the trustee take possession of and manage said premises, evidences conduct indicating an acceptance of the assumption clause in said Warranty Deed; that said contract on the part of said parties hegates repudiation of said clause, but is evidence of its acceptance by said parties, and that the execution of said instruments in writing correborates a recognition by the Marzanos of the existence of said assumption clause and their acceptance thereof.

That the contention of the defendants that said assumption clause was inserted in said deed by mistake or inadver-

tence is not supported by the evidence.

That the Marzanos, after deducting the unpaid balance of the debt secured by the Trust Deed from the purchase price of the premises, and the delivery of the Warranty Deed to them, took possession of the premises, collected the rents therefrom, made payments therewith on account of the indebtedness secured by the Trust Deed; that Catherine Marzano entrusted the management and supervision of said premises to Vito, and the various acts of Vito in receiving the said Warranty Deed from the grantors entering into possession of the premises and collecting the rents and making payments on account of said debt, were binding upon Catherine; that after entering into possession, neither Vito nor Catherine repudiated the said clause in said deed under the terms of which they assumed and agreed to pay the debt; that said payments by Marzanos on account of said mortgage debt negatived repudiation of said assumption clause, in said deed and evidenced conduct indicating acceptance of said clause, and that Catherine Marzano was personally liable for the payment of said debt."

The "closing statement" referred to in this report is as

follows:

"William L. O'Connell
Receiver for
Novak & Steiskal State Bank
Suite 200 - 1106 West Thirty Fifth Street
Telephone: Boulevard 4810
Chicago

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That the execution of said instruments by the H racros, by the terms of which they agreed that trustee take nonsession of and manage said presises, evidences conduct indicaating on scooptance of the sessmaption clause in said terraty
Deed; that said contract on the part of said parties begates
repudiation of said chause, but is evidence of its scooptance by said parties, and that the execution of said instruments in writing correspond to recognition by the thrends of the existence of said resumption oleuse and their acceptance .Toprout

That the contention of the defendante that assumetion clause was inserted in said doed by mistake or insdrer-

tence is not supported by the evidence.

That the serrance, after leducting the unprid halance of the debt secured by the Trust Deed from the purchase price of the premises, and the delivery of the 'arrenty weed to them, took possession of the premises, collected the renta therefrom, made payments therewith on ascount of the indebtedness secured by the Trust Deed; that Ostherine Terrano entrusted the management and supervision of said premises to Vito, and the verious acts of Vito in receiving the said Perranty Deed from the grantors entering into possession of etnerges and collecting the rents and making payments on socount of said debt, were binding upon Jatherine; that after entering into peasession, neither Vito nor Onthrine regulated the said clause in said deed under the terms of which they assumed and agreed to pay the debt; that said pay-ments by Markenos on account of said mortgage debt negatived repudiation of said assumption clause, in said deed and evidenced conduct initeating seceptance of said clause, and that Catherine Parsano was personally liable for the organit ". iden bise to

The "closing atatement" referred to in this report is as

follows:

"William I. O'Connell Tof Tevisos Wovek & Steiskel State Bank Suite 200 - 1106 Rest Thirty Fifth Street TELEphone: Bouleverd 4810 Onionio

March 4, 1950

M. A. Hogel Deputy Meneiver onssish ofly By purchase of real estate at couth west Corner Magnolia and Josemont Avenues (North East Corner Vernen Park and Aberdeen, given as part payment) het . . Due to Wr. Krieter for insurance for unexpired time rataira bowalls viracorq

30.000

CB. ICA

By First Mortgage Bond Issue assumed \$71.500.00 Interest allowed Marzano by Kreiter on above from February 1, 1930 to March 1, 1930 . . . 357.50 Insurance premium rebated to Marzano on property given in exchange 47.20 \$71,904,70 Due Krieter for Property \$19.083.62 1928 and 1929 taxes on Krieter Property held in escrow . . 4,368,50 4.368.50 Balande due Kreiter . . . \$14,715.12 Paid by Marzano by cash . . 14,715,12 Closed Out".

It was identified by an officer of the bank and was admitted in evidence.

Plaintiff contends that the consideration for the conveyance of the premises in question by the Krieters to the Marzanos
was the conveyance by the Marzanos to the Krieters of the property
already referred to, the payment of the sum of \$18,700.00 in cash,
and the assumption by the Marzanos of the unpaid balance of the
indebtedness secured by the trust deed, which plaintiff contends
was deducted from the purchase price; that the warranty deed of the
premises was received and accepted by the Marzanos with the recital
that it was subject to the trust deed in question, and that, as
suggested, the Marzanos assumed and agreed to pay it.

Defendant's contention is that the contract for the exchange of real estate between the Marzanos and the Krieters provided merely for the exchange of what is termed "equities" without regard to the mortgage debt, and that the conveyance was made subject to the unpaid balance; that the insertion in the deed that the Marzanos assumed and agreed to pay the debt was made without the knowledge of Catherine Marzano; that she never made any payment on account of principal and interest of the bonds issued and secured by the trust deed, and that by no act on her part did she assent to, or ratify the statement in the deed, or agree to pay the amount of the bonds.

W. M.

| | 00,108,17 | By First Mortgage Rond Issue assumed |
|--------------------------------------|-----------|---|
| | 5G. 737 | February 1, 1950 to March 1, 1930 Insurance premium rebetes to |
| 371,304,70 | 08.73 | Marzano on property given in exchange |
| \$12,080,61 | 6,586,80 | Due Krieter for Property 1928 and 1929 takes on Krieter Property held in escrow Balands due Kreiter Paid by Marsane by oash |
| 4,368,50 \$14,715.18 16,715.18 | | |

. "troned Out".

It was identified became officer of the bork and was admitted in evidence.

Plaintiff contends that the consideration for the conveyance of the premises in question by the Kristers to the Arrance was the cenveyance by the Marranas to the Kristers of the property already referred to, the payment of the cum of \$18,700.00 in cosh, and the assumption by the Marranos of the unpaid belance of the indebtedness secured by the trust deed, which plaintiff emtends was deducted from the purchase price; that the virenty deed of the premises was received and accepted by the Karsanos with the recited that it was subject to the trust field in cuestion, and that is

Defendant's contention is that the contract for the exchange of real estate between the Aranos and the ricters provided
merely for the exchange of that is trued 'equities' mithout regard
to the mortgage debt, and that the conveyance was ande oubject to
the unpaid balance; that the insertion in the deed that the Arranos
assumed and agreed to pay the Jebt was ande ithout the knowledge of
Catherine Marzano; that the never made any payment on account of
principal and interest of the bonds issued and scoured by the trust
deed, and that by no act on her part did she ascent to, or ratify th
statement in the deed, or agree to pay the amount of conds.

The testimony taken before the master, as set forth in his report, indicates that the deal between the Marzanos and the Krieters was made in the Novak-Steiskal State Bank in Chicago, and that there were present at the time the deal was closed, the Kreiters, the Marzanos, an official of the bank, and several other persons.

John A. Blake, an attorney-at-law, who represented the Krieters at this time, and who was produced as a witness by defendant, testified to the effect that the cash paid was counted in his presence, and that he turned the deed over to the Marzanos. He also testified to the effect that there were two of the so-called "closing statements" before the parties at the time the deal was closed, one of which was retained by the bank, and one by the witness; that Blake's copy was destroyed, and that the copy received in evidence and already referred to, was retained by the bank. witness also testified to the effect that when the deal was closed between the Krieters and the Marzanos, there was exhibited a copy of the contract entered into between the Krieters and the Marzanos, that Marzano procused from a vault in the bank the cash to pay on account of the transaction in question, that the money was counted out in the presence of the witness, and that the witness said to Marzano, "Look at the contract, and see if all the conditions of the contract are complied with:" that the witness then delivered the deed from the Krieters to the Marzanos, and his wife. witness also testified that at the time the transaction was closed, there was no discussion with relation to the assumption of the debt by the Marzanos. On his cross examination, this witness testified to the effect that at the time the deal was closed, the Marzanos were present and were represented by one of the officers of the bank: that he saw a closing statement when the deal was closed, and that

The testimony taken before the mester, as set forth in his report, indicates that the deal between the Herzanos and the Kristers was made in the Movek-Steiskal State Fank in Chicago, and that there were present at the time the deal was closed, the Kreiters, the Marsanos, as official of the bank, and several other persons.

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The record also shows that after the Marzanos came into possession of the property in question, certain interest payments on the indebtedness secured by the trust deed in question became due on August 1st, 1930, February 1st, 1931, August 1st, 1931 and February 1st, 1932, and that such interest payments were all make by the Marzanos. Also, that the principal on two of such bonds for \$500.00 each became due and payable on August 1st, 1930 and August 1st, 1931, and that both were paid by the Marzanos. Whether they were paid by Vito ar Catherine Marzano, the record does not indicate.

After the filing of the original bill, and after the motion for the appointment of a receiver of the property had been made by the complainant, and on November 30th, 1932, the Marzanos executed an instrument which was acknowledged before Robert J. Monahan, a notary public and one of the solicitors for defendant in the instant case. This document recites, among other things, the making of the trust deed by the Shekerjians on July 31st, 1926, the defaults in the payment of principal and interest on the bonds, the filing of the bill to foreclose, and the statement by the Marzanos that they are desirous of avoiding the expense of a receivership, and that they consented that the successor trustee, the complainant here, take possession of the property, collect the rents and make certain disbursements in connection with the management of the property.

Among other things contained in this instrument is the following:

"It is hereby agreed that said successor trustee shall have the right to remain in possession of said above described premises and property and to collect the rents, issues and profits therefrom, notwithstanding the entry of any decree of foreclosure in any foreclosure proceedings to

a copy of the so-called closing statement was seen by this mitness at this time. The witness further etated that he could not say whether or not the document introduced in evidence was or as not the copy of such statement so exhibited and referred to.

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The record also shows that after the Marzanus came into possession of the property in question, certain interest payments on the indebtedness secured by the trust deed in alestion became due on August 1st, 1980, February 1st, 1981, August 1st, 1981 end February 1st, 1982, and that such interest payments were all make by the Marzanus. Also, that the principal on two of such bonds for \$500.00 each became due and payable on August 1st, 1980 and August 1st, 1981, and that both were paid by the Marzanus. Thether they are paid by Vito or Catherine Marzanus, the record does not indicater paid by Vito or Catherine Marzanus, the record does not indicated

After the filing of the original bill, and after the motifor the appointment of a raceiver of the property had been made by the complainant, and on kovember Sath, 1852, the darkands executed an instrument which was acknowledged before lobert J. dominan, a notary public and one of the solicitors for defendant in the instances. This document resites, among other things, the making of the trust deed by the Shekerjians on July 21st, 1898, the infinite in the payment of principal and interest on the bonds, the infinite of the bill to foreclose, and the estatement by the Frances that they called that the successor trustee, the receiverable, and that they consented that the successor trustee, the readshmant here, take possession of the property, collect the rants and make certain disbursements in connection with the ranagement of the property.

"It is hereby aproed that sold successor tructer shall have the right to reasin in possession of sold clove described premises and property and to collect the rents, issues and profits therefrom, notwithstending the entry of any decree of foreclosure in any foreclosure proceedings to

foreclose the lien of said trust deed, and notwithstanding any sale of said above described property pursuant to any such decree, and it is hereby agreed that the said successor trustee shall have full power and authority to remain in possession of said property although it shall not be required to do so until the expiration of the period of redemption from any such sale, provided a deficiency decree is entered in any foreclosure proceedings.

It is further agreed that the net rents, issues and profits after the payment of all expenses, including reasonable trustee's fees, accruing after the sale of the above described premises and property pursuant to such decree, shallbe applied by the said successor trustee from time to time during the period in which possession of said property shall be held by the said successor trustee in partial

satisfaction of any deficiency decree."

The law applicable to the case at bar is well stated in App. the case of Lange v. Bartlett, 207 Ill. 422, where this court said:

"We think the law is well settled that where a deed of property is made subject to an existing mortgage, the words 'subject to,' in the absence of anything in the context which would throw a light upon the intention of the parties, do not, in themselves, show an intention on the part of the grantee to assume the mortgage, and that in such case the intent of the parties is a question of fact to be established by the evidence."

In that case, the defendant, in an action brought to foreclose a mortgage on property owned by her, and prior to the beginning of the foreclosure proceeding and in an effort to forestall such a proceeding, entered into a contract with the mortgagee by which the mortgagor agreed to sell the property upon the following terms; as stated by the court in its opinion:

"At the price of \$4,790 * * * subject to (1) existing leases; (2) all taxes levied after the year of 1907; unpaid special assessments levied for improvements not yet made, and to encumbrance of \$4,000 due October, 1911, at 6 per cent interest; special assessment for paving Calumet avenue, not exceeding \$100.¹ Afterwards, a deed was made which conveyed the property at a stated consideration of \$6,000, subject to a mortgage dated October 10, 1905, given to secure a note in the sum of \$4,000 and to taxes levied for the year 1907, and all taxes and special assessments levied for improvements not yet made. Before the conveyance was made, Ida Hoskins, at the instance of the appellant, secured an extension of the mortgage for three years by the payment of \$90, which he advanced.

The appellant's agent, at the time of the transaction, prepared the following statement:

Chicago, Dec. 7, 1908.

Mrs. Ida Hoskins a.c 292 E. 38th St.

foreclose the lies of sold tro t deed, and not makehet suding any sale of said above leseribed property purpulate to any such decree, and it is nereby egreed that the said successed trustee shall have full power one resource oven linds setaurt possession of said proverty although it shall not be requirenest 100 % to write and to nesterman and little on of of from any such sale, provided a deficiency decree is entered in any foreologure proceedings.

bur source, ein a ten all that beerye redired et il profits after the payment of all expenses, .aclaing recsor-able trustee's fees, nearing after the sale of the above described premises and property parament to such decree, shallbe applied by the said autoessor trustme from time to time during the period in which obsession of said property shall be held by the said successor trustee in partial satisfaction of any deficiency dactors."

The law appliance to the case at bor is your in ted in

App. App. the court seid the court seid

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" At the orice of t. 790 * * abbject to (i) carating firm: ; fiel to read out reste belvel sout 118 (S) apecial assessments levied for improvements not yet and. and to encumbrance of 4,000 due October, 1911, to er cent interest; special suspension for paving thurst avenue, not exceeding \$100.1 Afterwords, a dead who melo which coureyed the pro-erty at a stated countderstion of , of, subject to a mortgage dated potaber 10, 1905, given to scour: tota in the cum of 74,000 and to tares levied for the year 1907, and all texes and epocial researements levied for improvements and yet made. Before the conveyance was whe, I a Testine, at the instance of the a peliant, squired an extraction of the mortgage for three years by the (ayant of 'M', which he

The appellant's agent, at the time of the transportant, prepared the following statement:

'Obier o, Dro. 7, 1932. Mrs. Ida Hoskins

s.c 292 E. 38th St.

Fred'k Bartlett & Co. Real Estate Phone Central 4857 100 Washington Street Equity \$790 Ins. Prem 13 \$90 Deposit Survey 10 Costs in suit 264191 7,40 Int. on inc. 10 10 12/6 37.57 Spl. Asst. excess over \$100 27.34 Contn. of Abst. & Redg. 11.95 Rent to 12/31 20.15 598.49 \$803.00 \$803,001 #

In confirming a decree of foreclosure, the court said:

"When, then the parties enumerated the liens that the property was 'subject to' and included only those tax and special assessment liens that the grantee was to be liable for, and excluded those that the grantor was to be liable for, they conclusively show that they were enumerating the items which the grantee was to assume. Among these was the mortgage in question. We are, therefore of the opinion that a proper construction of the words of the contract itself places the obligation to discharge the mortgage squarely on the appellant."

Here, we not only have the provision in the deed, the testimony as to the facts and circumstances surrounding the execution of the contract and deed, but we are confronted with the additional fact that after the bill to foreclose the mortgage was filed and the Marzanos had been served with summons in the case and during their lifetime, they allowed a default to be entered against them, and at no time denied that they had assumed and agreed to pay the mortgage as a part of the consideration of the conveyance of the property to them, as alleged in the bill. In addition to the above, we call attention to the fact that in the agreement for the trustee to manage the property in lieu of a receiver, it is shown that they anticipated the probability of a deficiency judgment against them.

In Rogers v. Herron, et al., 92 Ill. 583, the Supreme Court said:

"It is a clear proposition, that where a person purchases real estate incumbered by a mortgage, and as a part of the consideration agrees to pay and discharge the incumbrance, such contract creates a personal liability, which the courts will always enforce. #

Fred'k Bartlett & Co. esataE Ises tograte notheridate for Phone Central 4857 06 77 Equity 23 Ins. Frem 08# Deposit OF CHIVEY 7.43 Costs in suit 284191 Int. on inc. 10 10 12/6 73.57 27.34 Spl. Asst. excess over \$100 11.95 Conta. of Abet. & Redg. 30.15 Rent to 12/31 638,48

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In confirming a decree of forscheaure, the court said:

*When, then parties enumerated the liens that the property ws 'subject to' and included only those tax and apecial assessment liens that the grantee me to be liable for, and excluded those that the prenter was to be liable for, they conclusively also that they were enumerating the items which the grantee was the moregrae. Among these was the mortgage in cuestion. . e are, therefore of the contract itself places the obligation of the words of the contract itself places the obligation to discharge the mortgage equarely on the appelrant."

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"It is a clear proposition, that where a person purchases real estate incumbered by mortgae, and as a part of the consideration agrees to pay and discharge the incumbrance, such contract creates a personal liability, which the courts will always enforce."

We are of the opinion that all of the surrounding circumstances in this case, including the conduct of the Marzanos and
the evidence in the case, indicate clearly that when the Marzanos
bought this land, that as a part of the purchase price, they
assumed and agreed to pay this mortgage indebtedness. The decree
of the Circuit Court of Cook County is affirmed.

AFFIRMED.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

Ve are of the cointon that all c. of surrandil circumstances in this case, including the conduct of the Varance in
the evidence in the case, indicate clearly that then the France
bought this land, that as a lart of the cordinate price, they
assumed and agreed to say this mortgage indebtedness. The decreaof the Gircuit Court of Gook County in alligned.

AFFET 1 3.

DEMIN E. SULLIVAR. F.J. PAU LABAL, J. CLEGOL.

38526

KAREL SUP.

Appellee.

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CZECH LADIES BENEVOLENT SOCIETY,

Appellant.

APPYAL FROM

CIRCUIT COURT

OF CHICAGO.

 $287 \text{ I.A. } 614^3$

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the Czech Ladies Benevolent Society from a judgment obtained against the society in the Circuit Court of Cook County in an action brought by Karel Sup, plaintiff. The on action is predicated upon the following certificate, issued by defendant. December 1st, 1930:

"CERTIFICATE OF MEMBERSHIP-WHOLE LIFE.

By this Certificate Witnesseth: That for and in consideration of the payment of One Dollar and Fifteen Cents (\$1.15) and the payment of an equal amount on or before the last day of each month hereafter as long as the member named herein shall live, and the further payment of all Central Committee, Grand Ledge and Subordinate Lodge dues as provided for in the Articles of Incorporation, Constitution and Laws, Rules and Regulations of the Czech Ladies Behevolent Society, now in force or hereafter adopted, Sup, Catherina, a member of Frantiska Gregorova Lodge No. 47 located at Chicago in the State of Illinois, is entitled to all the privileges of membership in the Czech Ladies Benevolent Society, and in case of death of said member while in good standing therein and this Certificate is maintained in full force.

Central Committee of the Czech Ladies Benevolent Society of Ohio promises and binds itself to pay out of its Mortuary Fund to Karel Sup related to said member as Husband (subject to the Member's right to change the beneficiary) sum of Six Hundred Dollars, which sum, subject to the requirements, privileges and provisions of the application of said member, the Articles of Incorporation, Constitution and Laws, Rules and Regulations of this Society, now in force or hereafter enacted, all of which are made a part of this contract, and subject to all conditions precedent, shall be paid after satisfactory proofs of such member's death shall have been furnished, and upon surrender of this Certificate. This Certificate, the application for membership and medical examination, the Articles of Incorporation, Constitution and Laws, Rules and Regulations of this Society now in force or which may hereafter be enacted or adopted, shall together constitute the contract between the Society, the member and the beneficiary. This Certificate is issued and accepted upon the express conditions, agreements, and warranties contained in the Certificate, the application for membership and answers by the member to the medical examiner. * * **

38536

KAREL SUP,

Annellee.

Appell

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December let, 1930:

CZECH LADIES HENEVOLENT SCOTETY,

Appellant.

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TROOF TIUDALO

287 L.A. 614

MR. JUSTICE HALL DELIVERED THE CLINE OF THE SOUT.

This is an appeal by the drech L dies benevolent Scolety

from a judgment obtained eprinct the secrety in the Direct Court of Cook County in a setion brought by Warel Sup, Disintiff. The action is predicated upon the following certificate, issued by defeat

"OZ: FIRIO STA OF SEARL SHIP-WHOLE LIFE.

By this Certificate Witnesseth: That for and in consideration of the payment of One Boilar and Wifteen Sents (41.15) and the payment of an equal amount on or before the tast day of each month horsefter as long as the member nined herein shall live, and the further payment of old Central Committee, Grand Lodge and Subordinate Lodge Aues as a rovided for in the Articles of Incorporation, Constitution and Lagulations of the Czech Ladies and acceptant Acciety, no in Terce or hereafter adopted, Sup. Catherina, a member of Frantiska Gregorova Lodge No. 47 Loartes to Chicago in the State of Illinois, is entitled to all the crivileges of nembership in the Czech Ladies Benevolent Boolety, -ne in case has nier of pulborte book at ellis redmon bise to diesh to this dertificate is maintained in full force. Central Committee of the Crech L dies starvouent Tociety of Ohio promises and binds itself to may set of its lorterry Nund to Karel Sup related to said member as Husbanua (subject to the member's right to che age the beneficiary) was it Mundred Dollars, which such suchect to the remurements, privileges and provisions of the spolication of the sense, the Articles of Incorporation, constitution so hers, tales and degulations of this occiety, now in force or here there enected, all of which are made a part of this contror, and and the so lines, the area anothings if of jost due antisfictory proofs of auch member's in the shell have been furnished, and a on surrender of this levililate. This Certificate, the application for membersuip and media I createation, the Articles of Incorporation, Constitution and Laws, Rules and (egulations of this Society: now in force or which may herenfter be enacted or adopted, shall together constitute the contract between the Society, the cember and the benefician This Certificate is issued and accepted whom the express con-

ditions, agreements, and warrentles contained in the dertificat the application for membership and ensurers by the member

to the medical examiner. * *

The assured died on February 8th, 1933, at about the hour of 12:15 o'clock in the afternoon of that day. Upon a claim being presented under this certificate, the society declined to pay on the ground that the insured had forfeited her membership therein for non-payment of dues. Plaintiff insists that the beneficiary had kept and performed all of the terms of the contract. Defendant maintains that the insured was expelled under the constitution and by-laws of the society for the non-payment of dues for the months of October, November and December, 1932, and that this expulsion from the order took place at a meeting of the society on January 12th, 1933; that at that time no payments had been received on behalf of the insured for assessments in accordance with the provisions of the certificate, since September 8th, 1938; that on February 9th, 1933, the day after the death of the insured, the secretary of the society received an American Express Money Order for \$4.20, and that immediately thereafter defendant returned it to plaintiff; that thereafter and on December 6th, 1932, a postcard was mailed by the secretary of the society to Catherina Sup. in and by which she was informed that she was in arrears in the sum of \$2.80, that there was also assessments due of \$1.15 and \$.25. making a total due of \$4.20, and that this sum must be paid at the next meeting of the society to be held on December 8th, 1932; that on February 8th, 1933, the plaintiff, husband of the insured, went to a drug store and secured an American Express Money Order in the sum of \$4.20, and mailed it, together with the postcard referred to which was sent to the insured. The envelope in which this money order was mailed is in evidence, and shows it to be postmarked at 3 p.m. February 8th, 1933. The records of the society show that Catherina Sup was expelled from the society on January 12th, 1933, for nonpayment of dues.

The assured died on February 8th, 1937, at about the hour of 13:15 e clock in the efternoon of that day. Upon a claim being presented under this certificate, the society declined to cingraduran red befind the lugured bad forfeited her memberganger therein for non-paydent of dues. .laintiff insists th t the beneficiary had kept and performed all of the terms of the contract, Defendant maintains that the insured was expelled under the constitution and by-laws of the seciety for the non-payment of dues for the months of October, Movember and December, 1932, and that this expulsion from the order took place at a meeting of the society on January 12th, 1933; that at that time no payments had ocen received end dily sousbroom ni sinemassess rol berveni shi lo lisded no provisions of the certificate, since September 8th, 1956; that on February 3th, 1833, the day after the death of the insured, the secretary of the society received an American Express Money Order for \$4.20, and that lamediately thereafter defendant returned it to plaintiff; that thereafter and on December 6th, 1932, a costoard was mailed by the scoretary of the society to Catherina bup, in and by which one was informed that ane was in errears in the sum of .8. that there was also assessments due of al. 15 and . 35, waking a twen out to bise od teum mus sint that has .08.48 to sub latet meeting of the society to be held on December Sth, 1932; that on February 8th, 1933, the plaintiff, husband of the insured, went to a drug store and secured an American Express Money Order is the sum of berrefer bresteer ent dit regether with the costered referred to was sent to the insured. The envelope in which this money or was mailed is in evidence, and shows it to be postmerked at 3 p.m. February 8th, 1933. The records of the society enow to t Catherina Sup was expelled from the society on January 121, 1930, for nonpayment of dues.

Defendant's position is as stated, that the insured, having therefore defendant been expelled from the society for non-payment of dues, /is not liable, In reply to defendant's plea of non assumpsit, plaintiff filed a replication in which it is alleged that on February 8th, 1933, prior to the death of the insured, the defendant, through its duly authorized officers and agents, received for and on account of Catherine Sup the sum of \$4.20 for the monthly assessments and contributions due the defendant for the months of October, November and December, 1933, and that by its accepting such payments, the defendant waived its laws, rules and regulations, and that prior to February 8th. 1933. In this replication, it is also alleged that prior to the death of the insured, it had been and was the custom of the defendant in regard to the insured and other members of the society, to accept combined monthly assessments and contributions many months in arrears, and that the insured relied upon and depended upon this custom and established practice in delaying until February, 1933, to pay the assessments.

Karel Sup, plaintiff, testified to the effect that at about 8:30 in the morning of the day his wife passed away, he procured a money order made out to Mrs. Rose Kaderabek, that he enclosed the money order in an envelope, addressed it to Mrs. Rose Kaderabek at 2124

S. Cwyler Ave., Berwyn, Ill., placed a stamp on it and dropped it in a mail box, and that the money order was never returned to him.

On cross-examination, he stated that he purchased the money order in the morning, and that his wife died in the afternoon, and that he never received it back by registered mail, that he does not remember signing any receipt for a registered letter sent him by Mrs. Rose Kaderabek, but that he would not say that he did not. He then further stated that he did not remember getting it back.

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efendant! resition is so it ted, that the insured, had therefore defendan been expelled from the society for non-payment of dura f is not list In reply to defendant's place of mon as masti, sheliff filed a replication in which it is alleged that on Mebruary Sta, 1981, pric to the death of the imarred, the descendant, through the duly sutnor ized officers and apents, received for mid on account of intherine Sup the gum of \$4.20 for the worthly sassaments and contributions dus the defendant for the months of Ortober, Movember and Perember, 1955, and that by its ence, bins such the mers, the defindant writed its laws, roles and repulations, and that print to Tabruszy Stb. is In this replication, it is also elicaed turn thing to the death of the insured, it had been and was the quated of the definiting rea to the insured and other sembers of the wedicty, to sceept combined monthly seesgments and contributions many months in errears, and ber moreup elds now beloeve bas accu paller berrent eds teds established practice in delaying until February, 1983, to pey the

Marel Bup, pleintiff, testified to the effect tent at no served common order made out to ire. RoseKaderabek, that he enclosed the money order made out to ire. RoseKaderabek, that he enclosed the moorder in an exvelope, adarcased it to ire. The conclosed of it is order in an exvelope, and roased it to ire. The order two, thereps, life, placed a stame of it adarcabek of it is mail box, and that the coney order was never returned to him.

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Rose Kaderabek, a witness produced by the defendant, testified, in substance, that she was the financial secretary of the defendant society; that after receiving the money order referred to, she placed it in an envelope, addressed it to Mr. Sup, took it to a sub-postal station in Gioero and had it registered. The receipt of plaintiff for the registered letter was then received in evidence.

Defendant also introduced in evidence the envelope in which the money order was received by defendant, addressed to Mrs. Rose Kaderabak, 2124 S. Cuyler Ave., Berwyn, Ill., upon which there is a stamped legend which indicates that the same was mailed in Cicero on February 8th. 1933, at 3 p.m. It is not disputed that this is the envelope containing the money order which plaintiff sent to defendant. In his brief and argument, plaintiff does not deny that such is the fact. His principal point urged for sustaining the judgment seems to be that inasmuch as the defendant had, on various occasions, received dues after the date on which they should have been paid, it is estopped to urge that she thereby forfeited her membership in the society. It seems to be admitted by plaintiff that on December 6th, 1932, a postal card was mailed to Catherine Sup, the insured, informing her that she was in arrears at that time in assessments and dues in the sum of \$4.20, and that this sum must be paid on or before the next meeting of the society to be held on December 8th, 1932. On this same document, there was also a notice to the effect, that the dues were for three months, and that unless they were paid, the insured would be expelled. Following this on January 12th, 1933, the insured was expelled from the society for non-payment of dues. It is not denied that on various previous oscasions, the defendant had received dues after the time for the payment had expired. Defendant offered in evidence the by-laws of this society, one of which provides as follows:

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Rose Knderabek, a witness produced by the defendant, testified, in aubstance, that she was the financial secretary of the defendant society; that after receiving the money order referred take placed it in an envelope, addressed it to Mr. Sur, took it to a sub-postal station in Oloero and but it registered. The reseivator plaintiff for the registered letter was toer received in evidences

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Defendent also introduced in evidence the envelope in which the money order was received by defend ut, addressed to dra. Ross Kaderabek, 2124 S. Cryler Ave., derwyn, Ill., upon walch there is a stamped legend which indicates that the same was mailed in Gioero on February Sth. 1853, at 5 p.m. It is not dismited that this is the envelope containing the consy order which plaintiff ser to defendant. In his brief and argument, plaintiff does not deny that such is the fact. His principal point or est for suntaining th dudgment seems to be that incarnal as the defendant had, on veriaus occesions, received dues after the nate on which they should days been paid, it is estopped to urge the thereby forfeit duerwembership in the applety. It seems to be admitted by picintiff that un December 6th, 1938, a postal cord was mailed to Ostaerina the insured, informing her that she can in arrears so that the seessments and dues in the sum of \$4.20, and that this our must be pold on or before the next recting of the scotety to be held on December Sth. 1982. On this seme docusent, there was rise a netice to the effect, that the dues were for three months, and that unloss they were paid, the insured would on expelled. Following this on January 19th, 1935, the insured was expalled from the calety for non-payment of duca. It is not desired that an virtous revious occasions, the defendant had received dues after the time for the payment had expired. Defendant offered in swidence the hy-laws of this society, one of which provides as fullows: "Rights and Duties of Members. Members must pay all dues and assessments at Lodge meetings and at least one month in advance.

A delinquent member shall receive notice, but failure to receive notice is no excuse. For delinquency through the next succeeding Lodge meeting she shall be suspended from all benefits other than those reserved to her in her certificate; her suspension shall be recorded in the minutes of the Lodge meeting and official notice thereof sent to the Supreme Lodge. For delinquency through the second Lodge meeting after payment is due the member is automatically expelled. The Lodge shall notify the Supreme Lodge of such expulsion.

Member who has been expelled for non-payment may be reinstated on payment of all dues and assessments and the expense of suspension within thirty days. After thirty days, the members may be reinstated only upon making such payment and satisfactory medical examination for which she

pays."

The court refused to admit this by-law upon the ground, as we understand from the record, that it had been adopted after her admission to the society.

We call attention to the following provision of this certificate:

"This Certificate, the application for membership and medical examination, the Articles of Incorporation, Constitution and Laws, Rules and Regulations of this Society now in force or which may hereafter be enacted, or adopted, shall together constitute the contract between the Society, the member and the beneficiary."

We are of the opinion that the court was in error in refusing to admit this by-law in evidence.

In Steen v. Modern Woodmen, 296 Ill. 104, page 110, the Supreme Court said:

"A person who enters an association must acquaint himself with its laws, for they contribute to the admeasurement of his rights, his duties and his liabilities. Where, as here, there is an express and clear reservation of the right to amend he is bound to take notice of the existence and effect of that reserved power. The power to exact by-laws is inherent in every corporation as an incident of its existence. This power is a continuous one, and no one has a right to presume that by-laws will remain unchanged. Where the contract contains an express provision reserving the right to amend or change by-laws it cannot be doubted that the society has the right so to do, and where in the contract of insurance it is provided that members shall be bound by the rules and regulations now governing the society or that

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may thereafter be enacted for such government, and those conditions are assented to and the member accepts the benefit certificate under the conditions provided therein, it is a sufficient reservation of the right in the society to amend or change its by-laws."

In Knights and Ladies of America v. Weber, 101 Ill. App. 488, this court said:

"The evidence offered by appellant of the existence of its rules and by-laws should have been admitted. This evi dence consisted of a pamphlet printed in German, and which appellant offered to have translated to the court and jury; and also to show that copies thereof had been in force from 1895 to and during the year 1898, and were circulated among all the members of the order who spoke the German language and desired them, and among others, Louis Weber, the insured.

Publications of a mutual insurance company, generally circulated among its members, and purporting to contain its rules and by-laws, are admissible as prima facie evidence of such rules and by-laws."

The record clearly shows that prior to her death, the insured had been expelled from the society for non-payment of dues, and it is not shown that she protested and the record further indicates, and it is not seriously disputed, that the money order for the payment of her dues was mailed after her death. The judgment of the Circuit Court is reversed.

REVERSED.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

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DERIS E. BUILIVAN, F.J. and danil, J. MANIT.

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38539

FRANK C. RATHJE, as Successor Trustee under an Indenture of Trust, dated as of August 1, 1927,

Appellant,

V.

CLARENCE SERB, et al.,

Appellee.

COMMITTEE FOR THE PROTECTION OF THE HOLDERS OF THE FOREMAN TRUST AND SAVINGS BANK, as Trustee, FIRST MORTGAGE PARTICIPATION CERTIFICATES, consisting of BUET C. HARDENBROOK, WILLIAM T. BRUCKNER, A. K. SELZ and DAVID B. STERN,

Appellant,

. .

CLARENCE SERB, et al.,

Appellees.

CONSOLIDATED APPEALS

FROM SUPERIOR COURT

COOK COUNTY.

287 I.A. 614⁴

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This case is governed by the opinion in case No. 38501.

REVERSED.

DENIS.E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

FRANK C. *ATHDs, is successor Trustee under an Indenture of Trust, dated as of tuguet 1, 1927,

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OLAFRIOS SIRB, et al.,

Appellee.

I-UO: GIIGE Just

Sa. T. C. T. DELLESOT

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ber IA. 614

COMMITTER FOR THE PROTECTION OF THE HOLDERS OF THIS FCALMENT THUST AND SAVING SAME, SE TRUSTER, FIRST MONTOAGE PARTICIPATION CURTIFICATES, CONSISTING OF SHET G. HARDSHEED, A. SILLIAM T. SHUCKARR, A. S. PALL SHED DAVID B. STERK,

Appellant,

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CLARENCE SURD, et al.,

While Trees.

MA. JUSTICE MALL DELIVERSU FRE COLUMN OF TO ACT.

This case is governed by the opinion in a re bo. Isbal.

(80. 5.10.)

DEWIS.E. GULLIVAN, F.J. 180 CE SI, J. JONCI.

No. 38550

JOSEPH P. KORNACKE, Administrator of the Estate of FLORENCE KORNATOWSKI, Deceased,

Appellant,

.

CORNELIUS BLOMSETH and ARTHUR ANDERSON,

Appellees.

CIRCUIT COURT

COOK COUNTY

287 I.A. 615

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

Plaintiff, as Administrator of the Estate of Florence Kornatowski, deceased, brought suit in the Circuit Court of Cook County to recover damages said to have been sustained through the alleged negligent act of the defendants, which, it is claimed, caused the death of the intestate. The intestate died on February 5th, 1933, in Chicago. She left surviving her husband and a number of children.

Campbell Avenue, in the city of Chicago, on December 3rd, 1932, at about 8 or 8:30 o'clock in the evening. The negligence charged is that the defendant Blomseth, through his agent, Arthur Anderson, carelessly, negligently and improperly operated his car, and that the intestate suffered the injury from which she died. Two occurrence witnesses, one George Ebelbach and Charles Carey, testified for the plaintiff. The only occurrence witness offered on behalf of the defendant was Arthur Anderson, one of the defendants here, who was the driver of the car at the time and place in question. Objection was offered to his testimony, the objection was sustained, and he was not allowed to testify.

George Ebelbach testified to the effect that he was sitting in a parked car belonging to his brother-in-law, Charles Carey, directly opposite and across the street from the place where the acci-

No. 38550

Josiel F. ROFN ORD, definistr. ter of the _state of FLORENGE KNEWNYO .srl, Deceased,

, Janillogg.

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CORNELIUS BLOWS MH (EE HTRU ANDERSON,

appellees.



MR. JUST C. L. WILL DO LAW C. J. MILLY C. L. C.

Plaintiff, as administrator of the Wat to of Florence Firm -

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The accident in question happened on Eullerton ... venue nor Campbell Avenue, in the city of Chicago, on Decarbar Brd, 1987, the about 8 or 8:50 o'clock in the evening. The negligance of uged is that the defendant Blomeeth, through his agent, ... thur has room, carelessly, negligantly and improperly operated his car, and that the injury from which the died. The Courrence witnesses, one George Ebelbech and Charles Carey, within the plaintiff. The only occurrence witness off roll or behalf of the left as Arthur anderson, one of the definition to be better, who as the driver of the ear at the time and place in usuation. Offered to his testimony, the objection was usbined, and he was not allowed to testify.

George Shelb oh tostified to the effect to the estating in a parked car belonging to the brother-in-law, theretes taray, directly opposite and corps the street from the place where the act-

He described Fullerton Avenue as having two street car dent occurred. tracks upon it, and that between the car tracks, the roadway is paved with brick, and that opposite the tracks there is a concrete payement to the north and south thereof, and that the concrete pavements are about 10 feet wide; that on the night in question, it was raining, that he saw the decedent come out of an alley on the opposite side of the street from where the witness was sitting; that he saw the automobile driven by Anderson coming east, and that when he first saw this automobile, it was about a half block west of where it hit the intestate, going about 30 miles an hour; that after the intestate came out of the alleyway, she stopped on the concrete strip and allowed a car to go by, and that the second car (defendant's car) hit her as she was standing about a foot off the concrete strip; that the intestate was struck by the front fender of his car as she was standing still; that he could not say how long she was standing still, that she was thrown east/a little south about 20 feet and up to the curbstone, that the curbstone was about 4 feet from where she was standing; that when Anderson's car stopped, the back end of it was about 15 feet from where the intestate was lying. On cross-examination, this witness stated that he was 17 years old, that their car had been parked about 10 or 15 minutes before the accident, that he and his brother-in-law were engaged in conversation at the time; that traffic at the time was fairly heavy on Fullerton Avenue, moving both east and west, that it was foggy and the visibility was poor; that he saw the automobile in front of the car that struck the intestate, that both cars were coming along at the same rate of speed; that he did not see the car which struck the intestate change its course; that after leaving the alley, the intestate had about 6 feet to go

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before she reached the concrete curb; that in coming from the alley, she stepped in front of a parked car to the concrete; that at that time the car which struck her was about 35 or 45 feet away; that he could not say whether or not she moved after the first automobile passed her, and that the car which struck her came to a stop about 15 feet from where the intestate was lying.

Charles Carey testified to the effect that he was sitting in a car with Ebelbach, and that he saw the accident in question, that his car was parked about 15 feet east of Campbell Avenue, that it was raining and it was misty; that when he first saw the decedent, she was coming off the sidewalk from the alley: that at that time, there were cars going east and west in the street, that there was a street light about 10 feet from the alley suspended up high so that one could see very well at the time; that the decedent waited for one car to go by. that the second car hit her with its right/fender, and that at that time, the car was going about 30 miles an hour; that when the decedent was struck, she was thrown about 30 feet, and that the automobile stopped about 20 or 25 feet beyond her. This witness further stated that he did not remember whether the lights on the car were burning or not. On cross-examination, this witness testified that in stating that he did not remember whether the lights on defendant's car were burning or not, he did not mean to convey the idea that they were not burning, that he paid no particular attention to it; that there was nothing unusual about the car as he saw it coming before the accident, that it was coming along following the other traffic, and that there was a distance of about 40 feet between this car and the car in front of it, and that he saw the decedent just before the first car passed her; that as the first car went by, it momentarily oh-On the testimony of these two fact witnesses, the structed his view.

before she reached the concrete curb; that in coming from the liber, she stapped in front of a parked car to the concrete; that at that time the ear which struck her was about 35 or 45 feet awey; that he could not say whether or not she meved after the first automobile passed her, and that the car which struck her come to a stop about 15 feet from where the intestate was lying.

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cause was submitted to the jury, which returned a verdict of not guilty.

While the plaintiff makes the statement that the verdict is against the manifest weight of the evidence, an examination of his brief
leads us to the conclusion that the principal contention is that the
court improperly instructed the jury on behalf of the defendants. The
principal instruction complained of, is as follows:

"You are instructed that the law does not permit a person to bring an accident upon herself through her own negligence and then recover against another party, and if you believe from the evidence that the deceased saw, or by the exercise of ordinary care could have seen, the defendants' automobile approaching, and if you further believe from the evidence that she failed to see the defendants' automobile, or that having seen the defendants' automobile, she, nevertheless walked in front of it or placed herself in a position of danger, and if you further believe that such action on her part was negligence which proximately contributed in any degree to the happening of the accident, you must find the defendants not guilty."

At the time of the trial of this case, Section 67 of the Practice Act was in force, which required that specific objections to instructions should be urged before the jury retired, otherwise, they were waived. (Cahill's Illinois Revised Statutes, 1933, Chap. 110, Par. 195.) After the jury had retired, the following colloquy occurred regarding the instructions:

"Mr. Irwin: I want to note an objection to the instruction-The Court: You are objecting to the instruction. It must

Mr. Irwin: This instruction, if the jury believe that the plaintiff was suddenly in a place of danger, the defendant was not required to exercise ordinary care - that degree of care it would otherwise-

The Court: I don't see any reason why you cannot enter a stipulation that all objections be preserved and set forth specifically in the motion for a new trial. That will take care of the whole record.

Mr. Irwin: On the question of the number of instructions winding up not guilty. I want to object to that.

The Court: There are five.

Mr. Irwin: The instructions on damages and contributory negligence-repetition-unduly emphasized those subjects.

The Court: All right, you put in whatever objections you wish to in the record.

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of north that for sook was en' fedt befourtent era woy" bring an accident upon herself through her own bealt was the hier recover against another party, and if you helieve that the deceased away or by the exercise of ordinary are acald have seen, the defen ants' automobile up combine, and if ou for-ther believe from the svidence that and falled to see the durendants' sutomobile, or that h ving seen the A fandents' automobile, she, nevertheless reliked in front of it or object herself in sition of danger, and if you further believe that was etten on her part was negligenes which proximately centributed in any degree to the happening of the recident, you must that the der hilonts not guilty."

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Mr. Irwin: The instructions on dem, see in contribution; edf ligence-repotition-unduly ampheaised to se oubject. The Court: All right, you gut in whiter a chief all ever ich

to in the record.

Mr. White: Let's get straightened out on the instructions. The Court considers that as an oral instruction. Mr. Irwin: I do, and I am not going to send it to the jury. The Court: Both of you lawyers argued it to the jury. The statute says he may not testify. Your objection is to the substance, Mr. Irwin objected because the Court didn't write it out and send it to the jury.

This new Practice Act is something I don't know to I don't know, that is all. I don't know whether Mr. Irwin: anything about. I don't know whether

anything about. I don't know, that is all. I the Practice Act is broad enough to cover that.

The Court: I don't know. I don't think it is really vital as you gentlemen think so.

Mr. Irwin: It would be under the old Practice Act. but I

don't know about the new Practice Act.

The Court: There are the ones I refused, three on the matter of duplication. You may note an exception on the part of counsel for the defendant for the refusal. Let the reporters copy them.

Mr. Irwin: So far as the instruction being oral is concerned, you don't object to that?

Mr. White: No.

Mr. Irwin: You and I agree in that particular instance-You object to the substance. Note an objection The Court: on the part of defendants' counsel to the giving of the first paragraph of the Court's instruction to the jury given orally.

Mr. Irwin: He said he waived it. Mr. White: I am waiving any obje I am waiving any objection to giving it orally.

but I am objecting to the substance. The Court: Leave the oral part out.

Mr. White: I am objecting to the substance of the instruction

and take exception.

You object to the repetitions. All right, let The Court: the record show that the counsel for the plaintiff objects to the repetition finding defendants not guilty, which appears five times. I checked that." objection to any instruction five times, I checked that." A written motion for a new trial was filed, which contained no specific In Thiel v. Material Service Corp., 283 Ill. App. 46, this

court said:

"The defendant urges that the court erred in instructing the jury on the law relating to master and servant and independent contractors. The defendant also questions the giving of a certain instruction presented to the court by the plaintiff as being reversible error. The plaintiff, however, has called to out attention the fact that objections to the instruction were not specific, and under Sec. 67 of the Civil Practice Act and 27 of the Rules of Court, it does not appear that the specific objection to the instruction was made before the jury retired, and by reason of that failure the defendant is in no position to urge that the giving of the instruction was erroneous. People v. Schneider, 360 Ill. 43; People v. Reeves, 360 Ill. 55; Paulick v. National Bank of the Republic, 279 Ill. App. 160; and Greer v. Shell Petroleum Corp., 281 Ill. App. 238.

In People v. Schneider, 360 Ill. 43, the same question arose,

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the Court: Leave the or 1 , art cut.

Mr. White: I am objecting to she scostance of the instruction and take exception.

The Court: You object to the reportitions. I with let the record show that the counsel for the plain off object to the reportition sinding defounts not failty, and opening five times, I checked that.

A written motion for a new trial was filed, which contained no specifi

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o'i miditalilim al lerre fue e en l'unit cegru fac notat edT' jury on the law rolating to muster and burying . I multipling fury contractors. The der name also as gions who side at a same contractors, the definition of the sourt by the shift of a sinterin instruction presented to the sourt by the shift is being reversible error. The shift if, a trves, has allest to out attention the fact that conjusting so the instruction tend onto appealing and under sec. of out the shift instruction as and experiment to the fulse of sourt, is soon of the fulse instruction we and election the first retires.

The day reason of the filture the defendant is in no section to the gray of the themselves and the contraction as a section. to urgo that the giving of the instruction we are eremone. People v. Johneider, Joo Iil. 42; Foople v. Levyee, 65 111. 55; Foople v. Levyee, 65 111. 55; Foople v. Hellond E. pk of 'no. epublic, 178 11. pv. 160; and Greer v. Mail Petroleum Jorg. 881 131. ...

In loople v. Johneider, 560 111. 4. . . . e untion row

ind the Supreme Court said:

"It is also objected that the court erred in giving instructions to the jury. The record shows that counsel for plaintiff in error were given opportunity to object to proposed instructions and that no objections were offered. In this state of the record, and under section 67 of the Civil Practice Act, made applicable to this case by rule 27 of the rules of this court, objections to instructions given are not open to plaintiff in error here."

See also People v. Reeves, 360 Ill. 55.

We are of the opinion that the colloquy quoted does not show a compliance with the statute. We cannot say that the verdict is contrary to the manifest weight of the evidence. The judgment of the Circuit Court is affirmed.

AFFIRMED

DENIS E. SULLIVAN, PJ, and HEBEL, J, CONCUR.

"It is also objected that he court wred in giving instructions to the jury. The record shows that counsel for plaintiff in error were given opportunity to object to proposed instructions and that no objections were offered. In this state of the record, and under section 67 of the divil Practice of, made applicable to this case by rule 27 of the rules of this sourt, objections to instructions given are not open to plaintiff in error nero.

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CEMPINA.

DENIS E. SULLIVAN, PJ, and HEBEL, J, CONCUR.

No. 38575

ALBERT R. BRUNKER, substituted as plaintiff in lieu of WRAP-RITE CORPORATION, a corporation.

Appellee,

٧.

GREENLEE FOUNDRY COMPANY,

Appellant.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY

287 I.A. 615²

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment against the defendant, Greenlee Foundry Company, entered on July 2nd, 1935, for the sum of \$813.60. The cause was tried before the court and a jury. The jury returned a verdict for the amount of the judgment.

On March 18th, 1927, the Wrap-Rite Corporation entered into a contract with the Sommer & Maca Glass Machinery Corporation for the manufacture of certain bread wrapping machines. Fred W. Hauser testified to the effect that he was the superintendent of the Sommer & Maca Glass Machinery Corporation in the year 1927, and that as such superintendent, he gave written orders to the Greenlee Foundry Company, the defendant here, for the manufacture of certain castings, and that in the year 1927 the Sommer & Maca Glass Machinery Corporation was engaged in the business of manufacturing certain bread wrapping machines for the Wrap-Rite Corporation. The written orders testified to by this witness were not produced in evidence, and the record does not disclose that plaintiff made any effort to procure them. Hauser further testified that the representative of the Greenlee Foundry Company, with whom he dealt, was one S. E. Allen, who was the sales representative of the defendant corporation. His testimony is further to the effect that in the summer of 1926 he delivered certain wooden patterns to the defendant corporation to be used in the manufacture by it of the iron castings, which patterns were to be returned when the castings were

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returned a verdict for the malunt of the justiment.

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The evidence further indicates that from March 25rd, 1927, up to and including May 13th, 1927, various castings were manufactured by the Greenlee Foundry Company and delivered to the Sommer & Maca Glass Machinery Corporation, and that on May 15th, 1927, two days after the last of these castings had been delivered to the Sommer & Maca Glass Machinery Corporation, a fire occurred in the plant of the defendant company, in which these wooden patterns were destroyed. It is not shown that there was any agreement on the part of the defendant to return these patterns to the Sommer & Maca Glass Machinery Corporation at any particular time. The action as originally brought, was by the Wrap-Rite Corporation, and by it, it is sought to charge the defendant company with the value of the wooden patterns so destroyed in this fire.

There were three counts in the original declaration as filed. The first count is in trover, and charges that on May 6th, 1927, the defendant wrongfully converted 72 wooden patterns, the property of plaintiff, to its own use. The second count charges, in substance, that on March 4th, 1927, the Wrap-Rite Corporation entered into a contract with the Sommer &-Maca Glass Machinery Corporation for the manufacture of certain bread wrapping machines, by the terms of which the Wrap-Rite Corporation was to furnish the necessary patterns from which these castings were to be made; that the defendant operated a foundry in the city of Chicago, and that the Sommer & Maca Glass Machinery Corporation contracted with the defendant for the manufacture of these castings, and had delivered to the defendant certain wooden patterns belonging to the plaintiff; that on May 6th, 1927, the defendant had completed and delivered all of the eastings, as provided, and it then became the duty of the defendant to return the patterns, and that defendant, though often requested so to do, had failed and refused to deliver such pat-

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to and including they loth, 1989, verious a stings over ordered to the Greenlee Foundry Joseph no. elivered to the order the Gleen chinary Jorgerstian, and thet on they lote, 1994, 1994, other the list of these dastings had been delivered to the obsert of Gleen and elevancy, in Jorporation, a fire occurred in the lint of the folia and elevancy, in which these vector patterns were destroyed. If the relationship is any experient on the part of the defined to relate the series to the source at least of the defined of the relation of the relation of the source at least of the defined of the reportion of the relation. The detical as originally in again, we to the respective to the report the contained of the share the wooden patterns so destroyed in this fire.

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There were three counts in the original deel a tion of the

The first count is in trover, and charges that all any time, 2017, the defendent wrongfully converted V2 wooles patterns, the promotty of claim tiff, to its own use. The second scuth obliges, in substance, that owner 4th, 1927, the Wrep-life Jordan intend into a countration of the Sommer A whose class Labitary Jordan in the Law a nufficients of certain broad wrapping creatines, by the terms of which he appears to furnish the massery atterns from this he appears to portion was to furnish the massery atterns from the description when the the defendent for the manifesture of those classifications of this the defendent for the manifesture of those classification had delivered to the defendent certain wooden patterns hallowed and action of the castings, as provided, and if then become it of anty

of the defendant to return the patterns, and to telement, and to often requested so to do, had falled no refusel to telty request.

terns. to the damage of the plaintiff. The third count is in assumpsit, and the charge in it is substantially the same as that contained in the second count. The defendant filed a plea of not guilty as to the first two, non assumpsit as to the last, and a special plea denying that there was any custom in the foundry trade by which patterns furnished to the foundry, were to be returned at any particular time, and a further special plea in which it was set forth that the patterns in question were destroyed by fire while in the possession of the defendant, without any negligence on the part of the defendant. Subsequently, an amended declaration was filed, which is identical with the original, in which it is set forth that Albert R. Brunker, the plaintiff here, had acquired all the rights of the Wrap-Rite Corporation in the subject matter of the lawsuit. After hearing the evidence, and before the case was submitted to the jury by leave of court, the third count of the declaration was withdrawn, and after the evidence had all been submitted and over the objection of defendant, the court allowed an amended declaration to be filed, in which the plaintiff charges that on May 6th, 1927, defendant undertook and agreed with the Sommer & Maca Glass Machinery Corporation to return all the patterns referred to upon the completion of castings made from such patterns; that all the castings had been made and delivered on May 13th, 1927, and that on May 8th, 1927, and at various times, the Sommer & Maca Glass Machinery Corporation had demanded that such patterns be returned. Defendant objected to the filing of this amended count on the ground that it would change the issues in the case. There was no rule upon the defendant to plead to this count, and no opportunity given it to plead. The record shows that the last of the castings so manufactured by it were delivered by the defendant to the plaintiff two days before the fire.

torns, to the damage of the latastif. The third own is I savenusit, and the charge in it is abbountially the same or that continue of se willim to a to sele a belift ine defen off . The count of the selection in the select the first two, non assumptit as to the last, and a special ples longing that there was any quater in the foundry track boy a bol wetterny furnished to the foundry, were to be roturned at any ser is her time. and a further special plea in which it was set first that the terms in question were destroyed by fire while in the possession of the de-.tn ba lok out to tree eat no ecaegigen yea act the lok out .tm Ati- 1-street at which to the "iled. which is itention be of the contract of t the original, in which it is not forth that thought H. drunker, the plaintiff here, had sequired .ll the rights of the brun-Fite jornor tion in the subject matter of the Lewswit. After hearing the evidence. and before the case was rubmitted to the fury by love of acure, the conclive od a the lar, merthatian was related of to the over the had all been submitted and over the objection of definition, he actit allowed en emended deel ration to be filed, in which who is intit! charges that on Mey 6th, 1927, defendent undertook in the cith the Sommer & Mass Grant Corporation to r turn all the outden and size spattage to mottelgame edt moqu of betrefer antet patrice in observation of the continue of the telegraph of Mir 13th, 1927, and that on May 8th, 1827, and at various times, the Sommer & Mass Glass Machinery Corpor tion h d Assended Christon - 2 : f lo . milit et t ob beteet to the below . be returned. manded count on the greund that it would change the i sue in the There was no raise upon the defend at to tlend to an aswering and no opportunity given it to plead. The record while that the ent ve longvile: erew it ve bemutentumam or sanitare ent to trail defendant to the plaintiff two days before the fire.

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Plaintiff's contention is that at the time the agreement was made with the defendant for the making of the castings referred to, it was agreed between the parties that defendant would return the patterns which had been deposited with the defendant by the plaintiff with the delivery of each installment of the castings. There is no proof in the record that defendant was negligent in caring for these patterns, and there is no claim made by the plaintiff in his brief that defendant was negligent to any degree in caring for them. On the question as to when the patterns were to be returned, Hauser testified to certain conversations alleged to have been held with Allen. the sales representative of the defendant company. He testified to the effect that he told Allen that when he took these patterns over. and when they finished with the patterns on the first bunch of machines. that he. Allen, was to bring the patterns back, and that Allen said. "O. K." Hauser further testified that he could not remember when the patterns were delivered, and that he could not tell the date of his conversations with Allen. He further testified to the effect that there was some complaint by the Sommer & Maca Glass Machinery Corporation that there was a shortage in some of the castings, and that a representative of the defendant company told the witness, in substance, that when this fact, if it was a fact, was made known to the defendant company, that the shortages, if any, would be checked up, and that after the fact in connection with this matter was cleared up, the patterns would be returned, and that he, the witness, told the representative of the defendant company that that would be all right; that he, the witness, was at the foundry just two days before the fire, and that he there sorted out the patterns which had been delivered to the defendant company to make the castings. the evidence of this witness, it seems apparent that on the day testified about, which, as stated, was two days before the fire

Plantiffe contention is out to the "Ere tie to the content of made with the defendant for the making of the coethirs informed to. it was agreed between the parties that defundant would - turn the art-Thirtil od to do on the lot til the later bed bed held smill the litter and the on all electrons of cach installment of the castings. There is seeds to antire of the militar saw thologfob felt broper ent in Toorg patterns, and there is no claim made by the plain iff in ois brief that doftendant was negligent to any degree in caring for them. the question as to when the patterns were to be returned. Hauser tratified to eartwin conversations .lleged to lave t en held with .llen. the sales representative of the defendant company. As testified to the offect that he told Allen that when he took these patterns over. and when they finished with the patturus on the first bunch of machine that he, Allen, was to bring the patterns book, and that allen said, "O. X. Heuser further testified thit he could not remarked when the patterns were delivered, and that he could not tell the date or testine with of lefting the forther tastified to the effect to that the was some complaint by "to journe as seen stant Corporation that there was a shortage in some of the casting, and that a represent tive of tha dufend nt commony bold the vitness, in substance, thet when this fact, if it was liket, was word to the defandint company, that the shortages, if may, will be should up, and that after the fact in commection ith that an atteracts cleared up, the patterns would be returned, and that he, in inthicia, of flow foliosestative of the definition conjugate the state of the all right; that he, the witness, was I the filleday just a Class before the fire, and that he there surted ou the estima distinct been delivered to the definition to only to age the trainings. of the state of the witness, it seems appropriet that the seems appropriet testified about, which, as stated, was two days he wis the fire

cocurred, he had gone to the foundry of the defendant company, and had there picked out the patterns which he claimed belonged to the Sommer & Maca Glass Machinery Company and ordered them returned. As stated, plaintiff does not claim that defendant was guilty of any degree of negligence in the care of these patterns. The testimony of this witness Hauser is vague as to whether or not there was any agreement as to the time when these patterns were to be returned. Without such an agreement, there is nothing upon which the action can be predicated, for there was no effort made to show any want of care on the part of defendant which resulted in their destruction.

We find nothing in the record which justified the submission of this case to the jury. Therefore, it is ordered that the judgment be reversed and that defendant have judgment here for costs.

REVERSED AND JUDGMENT HERE FOR COSTS

DENIS E. SULLIVAN, PJ, and HEBEL, J, CONCUR.

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REVERSAD : D JULINER WARREN FOR COLTE

DEWIS E. SULLIVAN, 15, and HEBBL, J, CONSUR. No. 38588

OSCAR ALBERTINE.

Appellee

APPEAL

MUNICIPAL COURT

OF CHICAGO

CHARLES L. OSBORN and HARRY W. OSBORN. co-partners doing business as OSBORN BROS ..

Appellants.

287 I.A. 61

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendants from a judgment of the Municipal Court of Chicago against them for the sum of \$600.00. The cause was tried by the court without a jury, and the judgment is based on the finding of the court.

The action is based upon the following contract:

"This Agreement, entered into this 30th day of October, A.D. 1925, by and between Charles L. Osborn and Harry W. Osborn, co-partners doing business under the style and name of Osborn Bros., hereinafter referred to as parties of the first part, and Oscar Albertine, hereinafter referred to as party of the second part, Witnesseth:

That Whereas, the parties of the first part have heretofore. to-wit: two and one half years ago, employed party of the second part to experiment with and to attempt to produce a new and novel type of hat stretcher; and

Whereas, the party of the second part has produced and on this date exhibited to the parties of the first part a working model metal hat stretcher which upon dilation ax expands laterally as

well as longitudinally in a proper ratio; and
Whereas, the party of the second part has at all times understood and agreed that all ideas, plans, models and contrivances pertaining to hat stretchers which might be produced by him, as well as any patent rights on or resulting therefrom, shall be the property of the parties of the first part; and
Whereas, the said party of the second part has agreed to do
all acts and to execute and deliver such instruments as may be

necessary to obtain and preserve such rights to the parties of the

first part; and

Whereas, the party of the second part agrees that the parties of the first part have heretofore paid him in full, to date, for all work, labor and materials furnished by him in carrying on the aforesaid enterprise; and

Whereas, the party of the second part is about to supply himself with certain patterns, dies, gates, etc., necessary to manu-

facture the aforesaid stretchers; and

Whereas, it is the intention of the parties hereto that the last mentioned patterns, dies, gates, etc., shall immediately be-

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This is an enteal by definite tone signature wellcipal Court of Chicago scainst town for the same of , 10.00. e was sil was tried by the court without a jury, and the jungment is outed on the finding of the court.

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"This agr. on ut, entered into this 50th boy of October. . . 1925, by and between Tharles I. Osbern and Ford Cabern, separtners foing business unary the state of asbern arca, hereinafter referred to as parties of the tirt art, of rear Albertine, hereinafter r ferred to as jurty of the second rt. itnesseth:

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type of hat stretcher; and Whereas, the party of the second out has a wolkest adon his Lofor millar a fro, forit ent lo cettur ent of boilding estab as yell net the other was multillib mage while menetants ten latem be joit. a motorq of at yllasibutionel as flow

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facture the forestid erretchers; ed hacture the fitte the intention of the critics feretce and for last mentioned patterns, dies, cates, atc., ak l i all the

come the property of the parties of the first part, and Whereas, the parties of the first part desire to employ the party of the second part to manufacture a number of the aforesaid hat stretchers:

Now, Therefore, it is agreed by and between the parties here-

to as follows:

Party of the second part agrees to manufacture and sell to parties of the first part, and parties of the first part agree to buy, two hundred (200) hat stretching devices similar to the sample on this date exhibited, said stretchers to be in a finished, workmanlike, merchantable article satisfactory to the parties of

workmanlike, merchantable article satisfactory to the parties of the first part; the price for the same to be the sum of Three and 75/100 dollars (\$3.75) each. It is agreed that the parties of the first part will pay in full for the stretchers on or before the tenth (10th) day of the month following the day of delivery.

Party of the second part agrees to sell and convey to the parties of the first part all the patterns, dies, gates, etc., to be used in this enterprise, and it is agreed that title to such patterns, dies, gates, etc., shall be at all times hereafter in the parties of the first part, and that the second party will not use same for any purpose other than to carry out this enterprise. It is agreed that parties of the first part shall pay the party of is agreed that parties of the first part shall pay the party of the second part Nine Hundred Fifty Dollars (\$950.00) for said pat-

terns, dies, gates, etc., as follows:

(a) Three Hundred Fifty Dollars (\$350.00) cash, receipt of which is hereby acknowledged, on the execution of this agreement;

(b) Three Hundred Fifty Dollars (\$350.00) at the time of

placing any additional order for the aforesaid stretchers; (c) The balance of Two Hundred Fifty Dollars (\$250.00) at the time of placing any second additional order for said stretchers. It is agreed that the election of the placing of any or all of such orders shall be in the sole direction of the parties of the

first part. It is agreed that the parties of the first part may at any time hereafter pay the unpaid balance of the said nine hundred fifty dollars (\$950.00) and immediately be entitled to possession

of said patterns, dies, gates, etc.

Party of the second part agrees to fully insure and to keep insured at all times all said equipment in his possession, at his

own expense, against fire, tornado and theft.

Party of the second part agrees to safely keep said patterns, dies, gates, etc., and to deliver the same to parties of the first part upon demand as soon as fully paid for. Party of the second part agrees to furnish parties of the first part at any time, upon demand, a correct itemized list of all such patterns, dies, gates,

In Witness Whereof, the parties hereto have hereunto set their

hands and seals the day and year first above written.

(Seal) Harry W. Osborn (Seal) Charles L. Osborn Oscar Albertine (Seal)"

In his statement of claim, plaintiff alleges that 200 stretchers, as described in the contract, were manufactured, delivered and paid for by the defendants, and that plaintiff received \$350.00 as a

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parties of the first tart all the patterns, dies, merce, to., to be used in this enterprise, ad it is election that the title to tack patterns, dies, gates, etc., shall do at all times have flor an parties of the first part, and there seemed they will act mes same for any juryone other than to some at his https: It is agreed that parties of the direct south by the city of the second part Wine Number of Litty Bold as (3.0. terns, dies, gates, etc., as follows:

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In Witness hereof, the earties hereto and hereunte at hands and seals the day but you sale slass and should

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chers, as described in the contract, were manifye uned, delivered to paid for by the defen aute, and that all dark received to . Co. payment for the cost of the dies; that no further orders for stretchers were placed, and that the defendants are indebted to him in the sum of \$600.00. Defendants made a motion to strike the statement of claim, which motion was denied. Thereupon, they filed an affidavit of merits in which they denied owing any money to the plaintiff, and alleged that further orders to be given plaintiff by them was a condition precedent to the payment of any further sums, and that no further orders were ever given beyond the orders referred to, because the goods delivered under the first order were defective, unsatisfactory and were not in accordance with the contract by plaintiff.

Plaintiff's contention is that although the contract provides that the stretchers to be manufactured were to be a finished, workmanlike merchantable article, satisfactory to the defendants, and that defendants were under no obligation to accept any further stretchers than those delivered unless they were satisfactory to the defendants, yet nevertheless, the contract is divisible, and that defendants are liable to plaintiff for certain patterns, dies, gates, etc., which are referred to in his brief as dies, because under the terms of the contract, the title to these vested in the defendants. As we read this contract, the article proposed to be manufactured by the plaintiff for the defendant was experimental in its nature, and the defendants by the very terms of the contract, reserved the right to determine whether the proposed article was satisfactory to them or not. It was their right to do this, and plaintiff signed the contract with this provision in it. The dies referred to were only to be used in manufacturing the article which plaintiff proposed to sell to the defendants under the terms of the contract.

In Green v. Ashland Sixty Third State Bank, 346 Ill. 174, the Supreme Court said:

payment for the cost of the dies; that he furth readers of the sum of were placed, and that the defendents are indebted to him it the sum of \$600.00. Defendants and e notion to strike the statement of alabe, which motion was denied. Thereugen, they alled on affid wit of motion in which they denied owing any maney to the denied of and alleges as further orders to be given plaintiff by them one condition proceed to the payment of any further sums, and what he further there were ever given beyond the orders referred to, themse has over collected under the first order vehicles by the ansatisative.

Plaintiff's contention as thet I that in the downers noving -n will effect to be menufactured were a page of the defect and the like merchantable article, satisfactory to the defendance . If the the fondants were under no obligation to covert any further surfactors of the delivered unless they were suttained by to the deletants. Yet Is it say the contract to dividile, int to taken apt the later apt the lift to plaintiff for certain outterns, dies, a tes, cte., citch are referred to in his brief ea dies, because under the terms of the eoptreet, the title to these vested in the differents. I ave in till control, the article proposed to be manufactured by the definit for the defendent was experimental in its moture, and the lean of the by the very terms of the suntuate, recorved the iicht to dee or ne was to the control with a same and the control and tented with the control of the their right of do this, and climate a sense of their climates of the contract the contract of provision in it. Whe side afters to core will a state of the -on __ seller a becoming Thit hal wear elait, and universe stouthes out to annet off tebus atns

In Green v. saland into The Court see 1 . 174, the Supreme Court oid:

"If the words of a contract are plain and unambiguous the contract must be so construed as to give effect to the plain and obvious import of the language used. (Bearss v. Ford, 108 Ill.16.) When the parties are competent to contract, with the wisdom or folly of their contracts, made for a consideration and without fraud, courts of law have no concern. (Florida Ass'n. v. Stevens, 61 Fla. 508; Mizell Live Stock Co. v. McCaskill Co., 59 id. 322.)"

We are of the opinion that the trial court was in error in finding for the plaintiff and in entering the judgment upon its finding. The judgment is, therefore, reversed and the order of this court is that judgment be entered here in favor of the defendants for costs.

REVERSED AND JUDGMENT ENTERED HERE FOR DEFENDANTS FOR COSTS

DENIS E. SULLIVAN, PJ, and HEBEL, J, CONCUR.

"If the words of a contract are lein and unambiguous to contract runt be so construct as to give effect to the plain of obvious import of the language used. (Bearss v. Ord, 108 111.15.) When the parties are compotent to contract, will the viscom or rolly of their contracts, male for a contract, will the viscom fraud, courts of law have no concern. (Toride So'n. v. Litvers, 51 Fig. 508; hizell live block no. v. Lichaschi Co., 50 1d.

We are of the opinion trat he tried action as in error in finding for the plaintiff and in entering the judgment upon its finding. The judgment is, tarefore, reversed and the out of this court is that judgment be entered here in favor of the default as for costs.

REVERSAL AUGMENT LEGALET ATTARLE DESIGNATION TO THE TOTALE.

DENIS B. SULLIVAN, 15, and HEBEL, 2, CONCUE.

38594

LEO AWOTIN,

Appellee,

V.

MICHAEL GABRYEL, et al.,

Defendants.

On Appeal of ADOLF DZIALOWY and MARY DZIALOWY, Co-defendants and Appellants.



COOK COUNTY.

287 I.A. 616

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of foreolosure entered on June 14th, 1935, in a suit by plaintiff against defendants. The facts in the case, as found by the Master to whom the cause was referred, are substantially as follows:

On October 1st, 1928, Michael Gabryel and Mary Gabryel. his wife, executed a trust deed to secure the payment of a principal note of \$5,000.00, due 5 years after date, and 10 interest notes dated October 1st, 1928, for the sum of \$150.00 each, due serially on the 1st of October and April of each year after the making of the principal note. Prior to September 30th, 1933, the Gabryels conveyed the property to the defendants. He further found that interest notes numbered one to four, both inclusive, evidencing semi-annual interest from October 1, 1928, to October 1, 1930, were paid and cancelled; that Leo Awotin was the owner of said principal note, and purchased the same together with interest notes Nos. 5 to 10 inclusive on February 5th, 1931; that interest coupon notes Nos. 5 to 8 inclusive, were duly paid, cancelled and surrendered; evidencing the interest due and paid October 1st, 1932; that default was made in the payment of interest coupon note No. 9 in the sum of \$150.00, evidencing semi-annual interest due April 1st, 1933, on said principal note; that default was made in the payment of interest

38594

LEO AMPLIA,

Appellee,

10-37

r v

MICHAEL GARAYEL, et al.,

Defendants.

GOCLF DZIALOWY and MARY DZIALOWY,

referred, are substintially as follows:

ORNOUTE SOURCE

JOCK DOUBTY.

287 I.A. 616

MR. JUSTICE HARL OBLIVE TO THE ESTIMA FOR IT TO THE

This is an appeal from a decree of foreclorurs entered on June 19th, 1935, in a suit by plaintiff against defendints. The facts in the case, as found by the Master to when the case as

On October lat, 1928, Michael Gabryel and Mary Tabryel, his wife, executed a trust deed to secure the Payment of a mindoal note of \$5,000.00, due 5 years after date, and 10 interest notes dated Cotober lat, 1928, for the sum of \$150.00 and, due sarielly on the lat of Cotober and April of each year after the making of the principal note. From the defendants. Be further found that conveyed the property to the defendants. Be further found that interest notes numbered one to four, both includive, evidencing semi-annual interest from October 1, 1928, to October 1, 1971, were poid and cancelled; that her Awotin was the owner of said principal note, and purchased the wase together with laterest and cancelled; that her said that the rest together with laterest and cancelled; that her said together with laterest and cancelled; that he said together with laterest and cancelled; that her that is

\$150.00, evidencing semi-annual interest due Antillet, 1931, meand principal note; that default was made in the payagest of interest

notes Nos. 5 to 8 inclusive, were duly raid, cancelled and carrender evidencing the interest due and paid Catober ist, lara; that effult was made in the payment of interest coupon notall. 3 in the com of

coupon note No. 10 in the sum of \$150.00, evidencing semi-annual interest due October 1st, 1933, on said principal note; that the principal note in the sum of \$5,000.00 matured on October 1st. 1933. and that an extension agreement as of September 30th, 1933, was executed by Adolf Dzialowy and Mary Dzialowy, his wife, the then record owners of said premises, wherein and whereby the payment of the principal note in the sum of \$5,000.00 was extended for a period of three years from October 1st, 1933, that is to say, until October 1st, 1936, with interest thereon from October 1st, 1933, at the rate of 5% per annum, payable semi-annually at the place in said note mentioned, as evidenced by six extension coupon notes dated September 30th, 1933, each in the sum of \$125.00, that it was agreed in and by said extension agreement that in case of default in the payment of any one of said interest payments, and in case of a failure to keep and perform any one of the covenants and agreements in said note and Trust Deed, that such agreement should at once become null and void; that subsequent to the execution of the extension agreement, Leo Awotin, Adolf Dzialowy and Mary Dzialowy entered into an additional agreement on September 30th, 1933, wherein it was provided that Leo Awotin would pay the taxes on the property for the year 1931, in the sum of \$178.24, and that Adolf Dzialowy and Mary Dzialowy promised and agreed to pay said Leo Awotin said money back in monthly installments of \$30.00. agreement is as follows:

"In consideration of that Leo Awotin will pay real estate taxes for Dzialowy on property at 4745 S. Kedvale Ave. for the year 1931 in the amount of \$178.24 plus penalties, Adolf Dzialowy and Mary Dzialowy, his wife, promise and agree to pay Leo Awotin said money back in monthly installments of \$30.00, payable on first day of each month, beginning Oct. 1st, 1933.

"It is further promised and agreed that said

couron note No. 10 in the sum of \$150.00, evidencing cont-spanel interest due October lat, 1952, on said principal note; that the principal note in the sum of US, 200.00 actured on October lat. 1970 and that an extension agraement as of Carterber 50th, 1058, was executed by Adolf Oziolowy and wary Oziolowy, his wife, the then record swners of said premises, wherein and whereb, the tayrent of the principal note in the sum of (6.000.0) was principal period of three years from Cotober let, 1983, that is to say, until October let, 1956, with interest thereon from October let. 1933, at the rate of 5: per annum, payable semi-annumily at the place in swid note menti ned, as evidenced by sir extension coupon notes dated September 30th, 1235, each in the sum of 1135.00, that it was agreed in and by said extension errement that in oras of default in the pryment of any one of gild interest payments, and in case of a failure to keep and deriors any one of the covennerand agreements in said note and Trust lead, is t such agreement should at once become mul and void; that subsequent to the execution of the extension agreement, Lee Awotin, Adolf Brislowy and any Daialowy entered into an additional saresment on Testember 20th, Persi and year liver ord I to the bivor was in niered was 2221 on the property for the year 1931, in the sum of 179.04, and thit Adolf Brislowy and Mary Jetslowy promised and agreed to my said . On. CE to agree the to monthly installments of El. Or. sgreement is as follows:

"In consideration of the thee estin will provide estate taxes for Drislowy on property at 474' C. Redvis Ave. for the year 1931 in the amount of 476' A plus pensities, Adolf Drislowy and Bry briclosy, has wife, promise and agree to pay hee swotin esid money back in monthly installments of 30.00, popular an irst day of each month, beginning Oct. 18t, 1863.

"It is further promised in agreed in the seid

Dzialowies are allowed to pay the interest coupon due April 1st, 1934, by monthly installments of \$30.00 and the rest seven (7) interest coupons in monthly installments of \$35.00, payable on the first day of each and every month. No action will be taken before the expiration of 30 days."

The Master further found that neither the defendants nor anyone in their behalf, had paid the general taxes for the year 1931 levied against said premises when the same became due and payable; that the plaintiff herein under the provisions of the Trust Deed herein sought to be foreclosed, and to protect the lien thereof, was compelled to and did pay the first installment of 1931 general taxes amounting to \$95.62, and the second installment of 1931 general taxes amounting to \$89.12 on October 30th, 1933; that the sums so expended by the plaintiff herein for said 1931 general taxes are under the terms of the Trust Deed herein sought to be foreclosed. so much additional indebtedness thereunder, together with interest thereon from the date of payment thereof at the rate of 7% per annum; that the said defendants, Adolf Dzialowy and Mary Dzialowy. his wife, on October 3rd, 1933, on November 4th, 1933, on December 2nd, 1933, on January 3rd, 1934, on February 3rd, 1934, and on March 5th, 1934, made payments of \$30.00 each, aggregating a total of \$180.00 to the plaintiff herein on account of the expenditure by him in payment of said 1931 taxes; that on April 1st, 1934, extension coupon note No. 1 evidencing semi-annual interest on said principal note as extended, became due and payable: that on said date there was due and unpaid the sum of \$4.74 on account of the expenditure made by the plaintiff for said 1931 taxes, together with interest at the rate of 7% per annum on the unpaid balance due, from time to time, on said advancement; that on April 7th, 1934, said defendants, Adolf Dzialowy and Mary Dzialowy, his wife, paid to the plaintiff the sum of \$30.00 on account of the balance due the plaintiff for payment of said 1931 taxes as aforesaid, and on account

Osialowies are allowed to pay the interest compon the April let, 1864, by monthly inerilaments of \$71.00 and the rest neven (7) interest commons in monthly installments of 35,00, payable on the first day of such and every month. No action will be truen before the expiration of 30 days."

The Moster further found that seltuar the defendants nor arrane in their behalf, had bee general texes for the year 1931 levied egainst eald receises when the same became the rad, avoic; that the plaintiff herein under the provisions of the Israt Ersd herein sought to be foreclosed, and to protect the lies therroff, was I renow Edel to her Hesant senit ent yee bib has of bellegaco texes amounting to "95.68, and the second installment of 1931 genera taxes amounting to \$89.13 on October 30th, 1923; that the sume as ear sense icaseng 1881 time and misron litiniely odd yd bebregae under the terms of the frust Beed herein sought to be forecion ... so much additional indebtedness thereunder, together rith intermit thereon from the date of negment thereof at the rate of To our annum; that the said defendents, thalf willlowy and Mary Orislony, his wife, on Cotober Sra, 1953, on Havember 4th, 1937, on Benember 2nd, 1853, on January 3rd, 1834, on retrusty 3rd, 1934, and on orror 5th, 1834, made payments of \$50.00 each, sagregating a tot 1 of \$180.00 to the plaintiff herein on appoint of the even the c by his in payment of said 1931 taxes; that on April 1st, 1984, extensi doupon note No. I evidencing semi-name I interest on a il ininipal note as extended, became due and payable; that on said detc tarre was due and ungaid the our of 4.74 on secoun' of the experience mede by the plaintiff for said 1881 ferrs, together with interest at the rate of 75 per annua on the unnaid of no dier out te ties, ASEL, ATT lings no Just; then april 7th, 1954, 1911 defendants, Adolf Ortalowy and dery Trialogy, is wife, reid to the sit out couried out to through no CO.089 to mus out littatale

plaintiff for payment of said 1921 taxes as eforestid, and on account

of said extension coupon note No. 1, due April 1st, 1934; that thereafter said defendants made the following payments on account of said extension coupon note No. 1, to-wit: On May 7th, 1934, the sum of \$30.00; on June 1st, 1934, the sum of \$5.00; on June 5th, 1934. the sum of \$25.00; on July 4th, 1934, the sum of \$15.00, and on July 20th, 1934, the sum of \$10.00; that no further payments were made by said defendants on account of said extension coupon note No. 1, due April 1st, 1934, and that default was made in the payment of the balance due thereon of \$14.74; that no payments were made by said defendants on account of interest coupon notes Mos. 9 and 10, due, respectively, on April 1st, 1933, and October 1st, 1933, or on account of any extension coupon note maturing subsequent to April 1st, 1934; that neither said defendants nor anyone in their behalf. had paid the general taxes for the years 1929, 1930 and 1932, levied against the premises, when the same became due and payable, and he found that the premises were forfeited for the nonpayment of the said taxes for the year 1929; that by reason of said defaults and by reason of the default in the payment of interest coupon notes Nos. 9 and 10, due on the first day of April and the first day of October, and by reason of further default in the payment of taxes for the years 1929, 1930 and 1932, the plaintiff, being the legal holder of said notes and Trust Deed, declared the entire amount due; that on September 28th, 1934, the plaintiff, Leo Awotin, paid on account of 1930 and 1929 general taxes the sum of \$237.66; that on said date, plaintiff, under the provisions of said Trust Deed, paid/first installment of the 1932 taxes amounting to \$72.06, and on account of second installment of general taxes for said year, paid \$41.16; that there is due plaintiff, together with costs and attorney's fees, a total sum of \$6,343.40.

Defendants' position seems to be as follows: (1) that by

of said extension coupon note Ao. 1, due . ril lat. 19: 10: after anid defendante unde the feilewing onyments on recourt all sai: extension coupon note Mo. 1, to-wit: An Way Pth, 1984, the east of \$30.00; on Jame 1st, 1984, the spec 0 .1.99; on cure bth, 1434, the sum of "35.07; on July 6th, 1 10, sum of 10.0, ... July 20th, 1954, the sum of '1). O; that no further a ce made by said defendants on cocunt of said extrusting our on note 10, due april lat, 1984, and that default was made in the agment of th balence due thereon of (14.71; th t no coyments mere on c by g id defendants on account of interest course notes or. o and 13, dar. respectively, on april 1st, 1089, and Cotoor ist, 198, or in account of any extension doopoo note that any subsequent to lat, 1934; th t neither wild definite nor enyone in their o half, had paid the general taxes for the we re 1939, 1880 and 1935, levied against the remises, when the give use due and is ale, and he found that the premises here forfeited for the nonenyment of the said texes for the ye r 1979; that by receou of said descripts and by resonn of the descrit in the cay ent of interest couron notes Nos. 8 and 10, day on the first her of a coin on the first by a October, and by reason of further despit in the regrees of taxes for the years 1989, 1980 and 1980, the plaintill, which has gover holder of seri notes and "rust bend, decised the setime count : that on Suprember 28th, 1904, the ; I haifi, Los social to 100 min of sexes forme 6061 bit of the success on said date, pleistif, that he movielouses ocid/first installasat of the Last tree mounting to . A. on account of second install dent of game : 1 ' the Late it is paid \$41.16; that there is our blantels, took to the contra attorney's fees, a total and of .5,548.40.

Defendants' position seems to be tollows: (1) the by

entering into the extension agreement of September 30th, 1933, the plaintiff waived all then existing defaults and thereby lost his right to declare an acceleration based thereon; (2) that the payments made by the defendants after the extension agreement, aggregating the sum of \$295.00, should be applied toward the payment of the defaults subsequently occurring, that is to say, the default in the payment of Extension Interest Coupon No. 1, and in the payment of the 1932 taxes.

As to the application of the \$295.00 paid by defendants, the Master found that the sum of \$186.78 was applied by plaintiff toward complete satisfaction of the 1931 taxes paid by him, and the sum of \$108.22 was applied by plaintiff toward the partial payment of extension interest coupon Note No. 1 amounting to \$125.00, which matured on April 1st, 1931, leaving a balance due on this note of \$16.78.

There is no question of fact involved. As stated, defendants insist that the defaults in payment, upon which the mortgage fore-closure is predicated, are for defaults that occurred prior to the execution of the extension agreement, and that, therefore, no right of action existed. The existence of the defaults is not disputed. By the terms of the extension agreement and the rider thereto concerning the taxes and interest, it is shown that defendants agreed to the application of the money paid by them to plaintiff, and that the defaults existed, as alleged in the bill and found by the Master, The action is predicated upon these facts.

We are of the opinion that the court did not err in approving the report of the Master and in entering the decree. Therefore,
the decree of the Circuit Court is affirmed.

AFFIRMED.

entering into the extension rement of sofember Tab. -, plaintiff solved will then existing defaults and thereby Iou. I right to deciste an accoleration bears therefor; (2) that the payments made by the defaults after the orthogon a secregating the sum of \$296.70, should be lift toward to the defaults subsequently accounting that in the last th

There is no succeious of a surely od, stard, seek and instant that the defends in myrant, and main and much of foresteries is predicted, are for defaults and convered of a so the execution of the extension agreement, and that, allegal over over, no minuted of sotion existed. The existence of the existence of the extension of the extension of the extension of the extension of the analysis of the second that the first the etc. Concerning the target of the absence of the algebras, it is a sorm that is for the etc. to the action of the absence paid by term to the election of the absence of the concerning the target, as allowed in the object of the concerning the extension of the absence of the content of the absence of the content of the absence of the theory of the absence of the content of th

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[.] J. C. A. CONTROL P. J. AND THE CO. N. A. C. C.

38591

AGNES GIESLER.

(Plaintiff) Appellee,

V.

CHICAGO, BURLINGTON & QUINCY RAIL-ROAD COMPANY,

(Defendant) Appellant.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

287 I.A. 616

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment entered by the court in a personal injury suit brought by the plaintiff for injuries sustained while a passenger of the defendant Railroad Company in December, 1932. The verdict of the jury was for \$15,000, which was reduced by the remittance of the sum of \$5,000 by the plaintiff at the suggestion of the trial court, and therefore the judgment is now for the sum of \$10,000.

The declaration upon which this action is based consists of three counts, all of which allege negligence. To the declaration the defendant filed a plea of the general issue, and also a plea of non-operation. A trial was had, and no point was raised on the pleadings.

The facts in this action are that on the morning of December 19, 1932, while a steam suburban train of the defendant was coasting about four miles per hour through fog upon track 4 of the Union Station, Chicago, the engine struck a bumping post, breaking the cowcatcher of the engine and

AGMES CIESLER,

(Pl intiff) ppellee,

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CHICAGO, BURLINGTON & BINCY RAIL-ROAD COMPANY,

(Defendent) poell nt.

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AR. JUSTICE REBEL DIGITOR THE OFINIO ! RES C ST.

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The feets in this setion are the on the mornin of December 19, 1938, while a starm suburben train of the least to the was coesting about four which per nour through for undertack 4 of the Union Statio, Chicsgo, the entire struck busping post, breaking the comestaber of the indine and

causing a sudden stop of the train on which plaintiff was riding as a passenger in the first car behind the engine, She was getting up from the seat and had one foot in the aisle and one foot between the seats. A number of people were standing in the aiele of the coach with their bodies about four to six inches apart. When the collision occurred the man in front of the plaintiff caught her with his elbow and she struck the seat in front of her, went over backwards and then sideways, and went down hitting a package carried by the man behind her and sat down on the floor of the aisle. She got up unassisted, got off the train and walked to the depot, up a double flight of stairs to Canal Street, boarded a bus and rode to Madison and Wabash and walked thence to her office in the Pittsfield Building where she worked as a dental assistant. She had a pain in her stomach and in the region of her hips and back. She worked at her desk the rest of the day, was off the following day, returned and continued to work, and does not know when she first lost time thereafter. She made no report of the accident, or of being on the train, to the railroad company.

Five days after the accident for the first time she saw a physician, Dr. Clowes, to whom she complained of her stomach but not her neck. The doctor made a complete examination of her with her clothes removed. There were no bruises, lumps or discolorations on her body, but she complained of pain in epigastrium in front and middle of her abdomen. She was told to and did use a hot water bottle therefor. She again went to Dr. Clowes on January 11th, after which she had a

causing a sudden stop of the train on which plantiff - finas a cassenger in the first der behind the outlass the words in edutou that and the Sloim and hi took one had bee took out more qu adf to state at all arrows those for admin A . wire a diff coach with their bodies cook for we si, ither their hen the the learner of archia. But its tunt at are est between soistion with his chow and she said the said in the contract of over backwards and then siceways, int one over inting a rose sever osrried by the man behind her and tot your on all floor of the aisle. The got up unassisted, got off the in a service the depot, up a double flight of stairs to lane, is set, bounded TAR of comput beside has decide but nogibes of abor bus and s I trob a or herrow one arady mainiful businestil and at acillo designation of the had a cain in her stomech and in the religion of her hips and back. Due worker at her desk the rest of the ey, was off the following day, returned and continued to ork, and does not know when and first lost tile there after. The new word ton week report of the schident, or of being on the train, to the relate of · VILEGINO O

Five days after the condent for the lies time obcsaw a physician, Dr. cloves, to whom ane condections or nerstomach but not her neck. The doctor made a nomines, and then
of her with her clothes removed. There were no ornines, and or
discolorations on her cody, but she completed of with in
epigastrium in a rent and middle of her ablocen. The world
to and did use a bot water pottle therefor. See him went
to Br. Cloves on draway litts, efter which he had a

lawyer make a claim against the defendant.

Plaintiff continued to work, and in March, 1933, went to Dr. Ritter, who had X-rays taken, and put her in a east on account of her complaint of pain in her back where he had operated on her in 1926. She was kept in a body cast until June, 1933, when she started to wear a back brace which she had worn after the operation in 1926. She wore a brace until December, 1933, when she started to wear a special corset, which she now wears during the day.

Plaintiff's pay is and has been \$15.00 per week and she has lost wages for nine weeks at \$15.00 a week since the accident, amounting to \$135.00. She washed dishes and ironed her own clothes; menstruation periods have been very irregular, sometimes occurfing in three weeks, sometimes in five weeks, and sometimes in four weeks, there being nothing unusual except difference in time. She has some pain every day and about once every two months has severe pain in her back and in the back of her legs, and is off two or three days from work. Her doctor and medical bills on account of the accident amounted to \$98.50.

Previous to this accident, plaintiff, who was born in 1903, and who started working when fifteen years of age, worked for the Burlington Railroad for three years, beginning in 1918, and gave up her position on account of chronic appendicitis, for which she had an operation. She then started training as a nurse, but was compelled to discontinue on account of pain in her back. She was operated on at St. Luke's Hospital in 1922 for an esteoma of the spine; thereafter she did housework. She was injured in a taxicab accident in 1924, since which time she has had pain in her back just below the place where a growth had been removed. She was unable to work thereafter except doing some of her own house-

lawyer make a claim against the derendent.

Plaintiff continued to work, and in March, 1833, went to Dr. Ritter, who had X-rays taken, and put her in a cast on account of her complaint of pain in her back where he had operated on her in 1926. She was kept in a body cast until June, 1933, when she started to wear a back brace which she had worn after the operation in 1926. The wore a brace until December, 1933, when she started to weer a special corret, until December, 1933, when she started to weer a special corret, which she now wears during the day.

Plaintiff's pay is and has been \$15.10 per week and she has lost wages for nine weeks at \$15.00 n week since the accident, amounting to \$1.55.00. The weeked disher and fromed her own clothes; menetruation pariods have been very irregular, sometimes occurring in three weeks, sometimes in five weeks, and sometimes in four weeks, there being nothing unusual except difference in time. The has some pain every day and about once every two months has severe pain in her back and in the back of her legs, and is off two or three days from work. Her dector and medical bills on account of the accident amounted to \$58.50.

Previous to this accident, plaintiff, who was born in 1905, and who started working when fifteen years of age, sorked for the Eurlington Railroad for three years, beginning in 1918, and gave up her position on account of chronic appendicitis, for which she had an operation. The them struted training as a nurse, but was compelled to discontinue on account of pain in her lack. The was operated on at St. Imke's Hospital in 1982 for an esteoma of the spine; theresiter she did housework. He was injured in a taxical accident in 1984, since which time she hus had print in her back just below the place where a growth had been removed.

work. A cast was placed on her back and she then wore a heavy brace until 1926, when, in walking, she missed a step, sat down, and thereafter had trouble with her legs and a great deal of pain in her back. She was again operated on in April, 1926, and another osteoma removed from where it had recurred since a former operation. She was also operated on for fusion of lumbo-sacral and sacro-iliac joints of lower back to relieve pain. Dr. Ritter removed strips of bone from spinous processes and ilium and laid them across the joints. She was in the hospital about three months and thereafter wore a cast for several months, and a steel and leather brace for three years or more, and ordinary corset thereafter. In 1928 she was in a hospital on account of nervousness and pains in the lower back and while under observation as to whether she needed further surgery for spinal fusion, after ten days she developed streptococci sore throat which kept her in a hospital seven weeks. She had colitis for several years after 1928, and has had headaches since strepto infection in her throat in 1928. She was in out-patient department of hospital in December, 1929, to have the back brace adjusted. In March. 1932 she had pain in epigastrium, bloating of abdomentand rumbling and gurgling noises associated with gastric trouble, having suffered on and off for a year or more. April, 1932, she was treated by Doctor Clowes for headaches and backache. In September, 1932, she was in out-patient department of hospital on account of again having some pain since the operation, especially when tired and nervous. In October, 1932, two months previous to this accident she was struck on the back of her neck by a baseball and had constant pains and headache.

After the accident in May, 1933, she was seen twice

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by Doctor Clowes for complaint of lung trouble, and in April 1934, she had swelling of her left ankle and leg up to her knee, which disappeared in four days, with history of having had influenza six weeks previous to leg swelling.

In November, 1934, she was treated for diarrhea for three days. In December, 1934, she had a cold in her head and chest for a week. In April, 1935, she went to the doctor on account of a cough.

In April, 1935, she was X-rayed by medical experts at the direction of her attorney. One lateral X-ray view was taken with her body bent forward and another view with her body bent backwards. Comparison of plates showed a narrower space in front between the vertebrae when she bent forward as compared with the view when she bent backwards. The doctors testified this was proper for a normal person, but because she had been operated on in 1926, to fuse the joints so they would not move, it was concluded and argued that she had a fracture of her back in this accident which occurred more than two years before the X-rays were taken.

- From the defendant's brief, no contention is made on the part of the defendant that it was not negligent or responsible for the actual damages from injuries, if any, sustained by the plaintiff. The whole controversy seems to hinge on the question of the nature of the injuries sustained by the plaintiff.

The plaintiff's position is that as a result of defendant's negligence she sustained a fracture or a breaking of a previously existing fusion of the vertebrae; that pain and suffering, which exists constantly, has resulted from such fracture or break; that the plaintiff has been forced to wear a brace during the entire day from the time of the acci-

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dent to the present time; that because of the accident plaintiff has suffered irregular menstruation; severe pains in her leg, rigidity of her back muscles in several places, inability to sleep at certain times, and various pain and suffering from all of these physical ailments; and that the plaintiff has sustained financial loss due to being incapacitated from doing her work as well as she did before the accident.

One of the grounds urged by the defendant for a reversal of the judgment is that where the verdict is manifestly against the weight of the evidence courts have reversed cases even though a remittitur has been entered by the trial court. Where damages are so excessive that they can be accounted for only on the ground. of passion, prejudice or misconception of the evidence, a remittitur will not cure the verdict. In support of this position defendant points to the fact that the accident occurred in December, 1932; that trial was had in June, 1935, and that plaintiff's total medical, hospital, and surgical expense claimed on account of injury was \$98.50. She states that after the accident she lost wages from her work for nine weeks, at \$15.00 per week, amounting to \$135.00, but her family physician stated that during the past two and one half years she has been treated for lung trouble, swelling of the ankle, influenza, diarrhea, and head and chest colds. The total financial loss claimed by her is \$230.50. This amount the def ndant alleges was the actual loss sustained by the plaintiff, and we gather from defendent's statement that the expense was incurred up to the time of the trial.

The question of damages, if any, sustained by the plaintiff by reason of physical injury, is the important one in this case, Liability for damages incurred has been admitted

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by the defendant, and its main contention is that there was no evidence of any union or fusion of her lumbo-sacral and sacro-iliac joints as the result of an operation in 1926, and that the claim for damages was based upon a claimed fracture of the fusion of these joints.

From the record it clearly appears that there was an operation upon the lumbo-sacral and sacro-iliac joints and that the plaintiff suffered pain prior to the operation, and that she lost the use of her legs; that as a result of this operation an improved condition prevailed so that the plaintiff was able to walk; that from 1926 to 1929 - approximately three years - she wore a brace to support her back; that after that period, in 1929, she was able to return to work without any brace, and there is evidence in the record that she made no complaint of any pain during the period between 1929 and 1932. It also appears from the record that she had been working and that her health appeared to be good, and from the medical testimony in the record it appears that there was a gradual cessation of pain from the day of the operation until the time of the accident, when it is contended that this fusion was fractured and she again suffered pain; that, according to the medical testimony, the absence of pain would indicate that the operation which had been performed for the purpose stated in this opinion was successful. The physician who performed the operation testified that an X-ray would not show whether there was a fusion, and he explained this by stating that in this type of injury the joint itself is not disturbed.

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X-ray would show whether a fusion had taken place after an operation of the character had been performed. The subject was thoroughly considered, but after all the question was one of fact for the jury, and it was necessary for the jury to determine whether or not the fusion had taken place, and in so determining weigh the evidence offered by the litigants, of which, in our opinion, there was sufficient to submit the question to the jury; in fact, the was the only question to be decided. The fact that the plaintiff had an operation prior to the accident raises the question whether the fusion of the vertebrae alleged to have taken place after the operation was disturbed by this accident. If the evidence establishes that it was, the plaintiff is entitled to damages.

The amount which the jury found to compensate the plaintiff for damages was \$15,000. The trial judge in his wisdom reached the conclusion, no doubt, that this amount was excessive and suggested to the plaintiff if she would enter a remittitur of \$5,000, the court would enter a judgment for \$10,000, which was done. From this exercise of its discretion we are unable to find that the court believed the verdict was due to passion or prejudice of the jury.

A number of authorities are cited by both sides upon the question of the Court's exercise of its discretion. The law is well settled upon this question.

Whether or not the exercise is a proper one must depend in each case upon the facts and circumstances before the jury at the time of the finding of its verdict. It is not necessary for us to point out the differences in each of

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the authorities cited upon this question, for they all conclude that what would be exercise of proper discretion by the court in each case must depend upon the facts and circumstances in evidence.

Defendant raises the point that counsel for plaintiff was guilty of misconduct in this case upon the ground that he repeated improper questions to which objections were sustained, thereby creating undue prejudice against the defendant, and points in its brief to the part of the record from which it appears that questions put to an expert witness had been objected to and the objections sustained by the court. The case hinged largely upon the question of medical evidence regarding the surgical operation. Plaintiff answers this contention by stating that no specific grounds were given for the objections made by the defendant, and plaintiff's counsel suggests that at no time did defendant's counsel think its case was being prejudiced, for the reason that he did not request the court to instruct the jury to disregard the questions at the time the examination took place. We have considered the objections of the defendant to the questions asked by plaintiff's counsel and the ruling of the court thereon. There is no indication in the record that the court did not act promptly. On the contrary, it appears that in most instances the ruling of the court favored the defendant.

Defendant complains of questions put by the plaintiff to the medical expert as to whether or not an operation would help the plaintiff. Such examination is proper when the questions asked are limited to the facts then before the jury and are intended to elicit from a witness his opinion regarding the the authorities offed upon this question, for they all conclude that what would be exercise of proper discretion by the court in each case gust depend upon the facts and circumstances in evidence.

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facts contained in a hypothetical question. Morton & Co. v. Zwierzykowski, 192 Ill. 328.

It is not always prejudicial error for counsel in a case to repeat questions after objections have been made and sustained. In the case of McInerney v. Western Packing Co., 249 Ill. 240, the Supreme Court upon this subject said:

"We see no justification for the question asked by counsel and he should not have asked it, but it was not a flagrant violation of the proprieties and calculated to prejudice plaintiff in error's case to such a degree that we would feel justified in reversing the judgment solely on that account."

As we view the record, we are of the opinion that it was not the purpose of the plaintiff to create prejudice in the minds of the jury against the defendant, nor did she do so.

The defendant contends that in the argument of plaintiff's counsel to the jury reference was made to the presence of Dr. Hall at defendant's counsel table. While it is never proper to refer to the presence of a witness or any incident not properly before the jury, still from an examination of the argument we are of the opinion there was no reversible error on that ground.

When we have in mind the defendant admitted liability for any injury sustained by the plaintiff as a result of this accident, which would unquestionably include the amount of damages to be assessed by the jury, it would seem such reference by counsel could not be criticized on the ground that such conduct tended to prejudice the jury.

After the verdict of the jury had been returned and before the court entered judgment, the defendant as grounds for a new trial filed a motion, supported by affidavits setting up

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newly discovered evidence and showing if a new trial were granted, defendant would be able to prove that X-rays taken in March. 1933, show no bone fracture or recent bony changes in plaintiff's back which would have been apparent at that time. It would seem from the affidavit offered in support of this motion that the subpoena deuces tecum was served on the officers of St. Luke's Hospital to produce all records of X-rays and reports covering the plaintiff. Certain X-rays were not located until after the trial, and although the plaintiff testified that some were taken in 1933 and Dr. Ritter, one of the witnesses for plaintiff, testified they were available, it does not seem from the statements as they appeared before the jury that the trial court erred in refusing to grant a new trial on the ground of newly discovered evidence. The rule is familiar that in making a motion of this kind diligence is necessary, and as far as we have been able to determine, there is nothing in the record that would indicate the X-rays which were to be used in evidence, and referred to by Dr. Jenkinson, could not have been found or produced for use at the trial, and if the defendant had knowledge of the fact that certain of these plates were in existence it would not be entitled to an allowance of the motion. The facts set up in the affidavit do not indicate diligence, and we are of the opinion the evidence sought to be offered, if introduced, would tend to bring in evidence to contradict the testimony of witnesses already before the jury. We believe the refusal of the court to grant a new trial on this ground was proper.

While the record may be erroneous in some respects,

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we are of the opinion there is no error that would justify a reversal of the judgment of the Superior Court, and it is affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN, P. J. AND HALL, J. CONCUR.

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. . A L. W. I WARDELL

DENIS & SULLIVAE, F. J.

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ELSIE HEIDE.

Appellee,

 \mathbf{v}_{\bullet}

LINCOLN FURNITURE & RUG CO., INC., a Corporation, and D.I. Eisenberg,

Appellant.

APPEAL FROM

SUPERIOR COURT

OF COOK COUNTY.

287 I.A. 616

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment in the sum of \$1500, which was entered by the court in an action brought by the plaintiff against the defendant Lincoln Furniture & Rug Co., Inc. and D. I. Eisenberg, to recover damages for assault and battery alleged to have been committed on June 5, 1932. Defendant D. I. Eisenberg was dismissed from the suit at the trial on plaintiff's own motion, and all reference to the defendant hereafter will allude to the Lincoln Furniture & Rug Co. Inc.

On June 5, 1932, defendant, a corporation was engaged in the business of selling furniture at retail in Chicago. D. I.

Eisenberg was its president and general manager at the time, having charge and control of the business. Prior to June 5, 1932, plaintiff and her husband had purchased certain furniture from the defendant on the installment plan, payment for which was secured by a chattel mortgage executed by them and delivered to the defendant. Plaintiff had defaulted in her payments and some conversation was had concerning the delinquent account, resulting in an agreement whereby defendant was to refinish a table top and deliver the same to plaintiff, who was to pay \$10 on the delinquent account when the table top was delivered to her.

On June 5, 1932, Berger, a truck driver for the defendant, was instructed by the president of the company to deliver the table

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On June 5, 193 , sarger, a truck date of the left of the trbie was instructed by the president of the couldy to initiate trbie

top to plaintiff and to collect \$10 as a C. O. D. transaction. When Berger arrived at plaintiff's home he was admitted by her and informed that she did not have the \$10.

With plaintiff's permission Berger then telephoned to
the place of business of the defendant for instructions as to whether
he was to deliver the table top or return it to defendant's place
of business because of plaintiff's failure to pay the \$10. The
telephone was answered by Kogen, a salesman and shipping clerk for
defendant. After receiving the telephone call, Kogen and Sam
Eisenberg, the son of D. I. Eisenberg, drove to plaintiff's home in
Sam Eisenberg's car. When they arrived at plaintiff's home they
were admitted by either the plaintiff or plaintiff's son and a conversation was had concerning plaintiff's delinquent account, during
which the plaintiff charges she was assaulted.

The amended declaration charged that the servants and employees of defendant, while engaged in repessessing furniture for defendant, entered the home of plaintiff and made an assault upon her, striking her on the breast and side, whereby the breast was required to be and was removed, the assault being within the scope of their employment; to the damage of plaintiff in the sum of \$25,000.

The defendant filed a plea of the general issue, and also a special plea claiming that the persons committing the alleged assault were not at the time and place mentioned in the declaration the agents or servants of defendant, nor engaged in or about the business of defendant.

The jury, after hearing the evidence, returned a verdict finding the defendant guilty and assessing plaintiff's damages at \$3,000. A remittitur of \$1500 was entered by the plaintiff and judgment entered for the plaintiff for \$1500. No question is raised in the briefs as to the sufficiency of the pleadings.

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It is not contradicted by any of the testimony in the record that the plaintiff and her husband purchased certain furniture from the defendant on the installment plan and there was a default in payments which resulted in an agreement that the defendant was to refinish a table top and deliver the table to the plaintiff, who was to pay \$10 on the delinquent account then due.

The controversy seems to be regarding what happened after defendant's truck driver, who was to deliver this table top to plaintiff and collect \$10 on the C. O. D. transaction, telephoned to his company regarding her failure to pay the \$10. The outcome of this conversation was that Mr. Kogen and the son of the president of the company went to the plaintiff's home, and after admittance the alleged assault occurred.

The plaintiff admitted she told Kogen to take the dining room furniture back, but, according to the evidence in the record, he persisted in removing such furniture as he deemed would be for the best interest of his company, and it was while he was attempting to move the furniture that the assault occurred when he threw his arm around plaintiff's neck and pushed her up against the wall, causing the injuries it is alleged the plaintiff suffered as a result of the assault.

The question stressed by the defendant is that the operation performed upon the plaintiff in removing her breast because of a cancerous condition could not have happened by reason of plaintiff's assault, and defendant's theory is that the evidence of the doctor introduced by the defendant was that a cancerous condition would not result from one assault only, but rather that the sore condition would be brought about by the continued abrasion of the area in which the cancer was developed.

However, plaintiff's doctor, who was also a witness; testi-

The plaintiff equitted the total coler to the the final room furniture ordy, but, seconding to the evidence in the views of the persisted in recoverns out a brail of the coler of the constant of the best interest of his constant, and is the collection of the farniture that the final coler of the color of the color of the theorem of the theorem of the theorem of the theorem of the color of the

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However, plaintiff's doctor, who has lie dinors, testi-

fied he removed the cancerous growth and made a microscopic examination of the tissue removed and that he was sustained in his diagnosis that the condition was cancerous. While we have the evidence of the doctors - which evidence was before the jury - that a cancerous condition may result from a bruise, the disputed question is whether such condition could develop from the assault alleged to have occurred when Mr. Kogen pushed the plaintiff against the wall with his arm around her neck, causing the bruise complained of by the plaintiff. These questions of fact were clearly ones for the jury, and we think they are sufficient in the record to justify the verdict of the jury.

It is contended there is no basis in the evidence for the damages awarded. As we have already indicated, the assault and the result thereof were questions of fact for the jury. No doubt upon considering the evidence of the doctors, the jury reached the conclusion that the verdict was justified.

As to whether or not the defendant is liable for the acts of its agent Kogen, it appears, as above stated, that Kogen came in response to a telephone message received by the defendant company at its place of business; that he came on an errand in connection with defendant's business, and after arriving at plaintiff's home talked with her regarding the payment for the furniture, and in attempting to enforce collection tried to remove the furniture from plaintiff's home, and, in determining to carry out the purpose of his visit for the benefit of the defendant company, assaulted the plaintiff.

The plaintiff in support of her position cites the case of Carlberg v. Spiegels House Furnishing Co., 178 Ill. App. 424, where the court said:

fied he removed the canourous growth and mese a microscould empired ation of the tissue removed and that the sustained in als in mustained the condition was cancerous. This was the evidence of the doctors - which evidence was before the jury - that a serator condition may result from a bruise, the disjuted cuestion is whether such condition could develop from the disjuted cuestion is whether coursed when Mr. Mogen maked the plaintiff against the wall with a remark when mesk, as using the bruise complained of cy the plaintiff. These questions of fact were clearly ones for the jury, and the jury are sufficient in the record to justify the vertical of the jury.

It is contended there is no waste in the evidence for the demages warded. As we have already indicated, the seasuht and the result thereof were curstions of fact for the jury. No doubt upon considering the evidence of the doctors, the jury co-case the considering the verdict was justified.

As to whether or not the detend at is at bir for the tets of its agent Aegen, it at ears, as above at tet, intliquence to a telephone message received by the teton on tentury etta place of business; that he came on an error; in count etten the defendant's business, and after arriving at antivities bour tolsed with her regarding the payment for the farmitare, and in the differentials to early out the arrors from a intition home, and, in determining to early out the arrors of the defendant company, sand, in determining to early, sand, in intiff.

The plaintiff in support of mer cuiti clice ine case of Carlberg v. Spierels Mouse Furnishing vo., IT ill. up. 427, whose the court said:

"It is urged as a ground for reversal that the verdict and judgment was contrary to the great weight of the evidence. In that connection it is claimed that the preponderance of the evidence shows that the entry into plaintiff's house was peaceable, and the search was permitted and participated in by the plaintiff. Upon a careful examination of the evidence, we think that it justifies the verdict of the jury. We are unable to perceive any ground, upon the merits of the case, for interfering with the verdict and judgment."

The defendant is liable for the wanton and wilful acts of its agents in the line of their employment and in the course thereof, while pursuing the business of the defendant. Keedy v. Howe, 72 Ill. 133; Singer Mfg. Co. v. Holdfedt, 86 Ill. 455; Ziegenhein Furniture Co. v. Smith, 116 Ill. App. 80. The evidence shows that the employes of defendant were engaged in the business of the defendant at the time of the trespass for which suit was brought, and that their acts were wanton and wilful, and performed in the line of their employment and under the instructions of the manager of the collection department of defendant. The defendant is clearly liable for the acts shown in the record."

This authority substantiates our position that the court was fully justified in refusing to grant a new trial.

The point is made by the defendant that plaintiff's counsel made improper and prejudicial remarks during defendant's argument to the jury, and for this reason the court erred in not granting a new trial. We have examined the record to determine whether the defendant was prejudiced by the attitude of counsel for the plaintiff, and are unable to say that there were prejudicial remarks which would justify this court in interfering with the verdict of the jury, and the judgment entered.

On the question of the remittitur, the trial court was in a position to consider this matter, having before it the attitude of the parties in interest, and when the court concluded and suggested to the plaintiff that a remittitur be entered the plaintiff was satisfied and judgment was entered with plaintiff's consent. We do not see that any error resulted from this action of the court. On the contrary, we believe the verdict was a fair and equitable one.

The judgment is affirmed.

JUDGMENT AFFIRMED.

"It is urged as a ground for reversal that the verdict and judgment was contrary to the great weight of the state the the suddence. In this commonstion it is alriaed that the preponderance of the evidence shows that the entry into plaintiff's house was serectal, and the residence are permitted and participated in by the partial of the particle of the cridence, we think that it justifies the verdict of the jury. So so unable to wredence of the car, the interceive say ground, upon the merits of the cas, for interceing with the verdict and judgment."

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v. Moldfodt, 3c III. 455; ilegandess strature 3c. v. Saith, IIC III. Apv. 80. The evidence shows that the evolopes of defendant were eng. 3cd in the two winders of the defendant and that their cots werter without with a trought, and that their cots werter as within, and refunctions in the line of the collection department of the manager of the collection department of all their sealows for the said with the income of the collection department of a felcular the trecord. "Saidwa in

This suthority substantiatus our osition to a the pour was fully justified in r fashing to grant a new trial.

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The judgment is affirmed.

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HARTFORD ACCIDENT & INDEMNITY CO., a Corporation,

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FEDERAL ELECTRIC CO., a Corporation, James M. Gilchrist, Agent,

FEDERAL ELECTRIC CO., a Corporation, James M. Gilchrist, Agent,

Appellee,

V A

HARRY LANG,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

287 I.A. 616⁴

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

On February 18, 1935, the plaintiff instituted suit against the defendant, alkging, among other things, in its filed statement that this defendant was indebted to it in the sum of \$111 for renewal premiums with reference to a bond heretofore given to the City of Chicago, pertaining to an electric sign located at 3025 Lincoln avenue, Chicago, Illinois; that thereafter the defendant, Federal Electric Co. entered its appearance, and an order was issued by the Municipal Court of Chicago, giving leave to this defendant to make Harry Lang, and Roman Furniture Mart, Inc. third party defendants.

That there was filed in the Municipal Court by the Hartford Accident & Indemnity Co,, plaintiff, a copy of an application for the indemnity bond involved herein, wherein the Federal Electric Co. agreed to pay to the Hartford Accident & Indemnity Co. the sum of \$30 premium upon the execution of the bond, and \$30 on the 14th day of May in each year thereafter until the Federal Electric Co. shall serve upon the Hartford Accident & Indemnity Co. at its home office,

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HARTFURD ROLLDRAT & IRD- 117 DC., a Gorpor-tion,

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FEDERAL ELECTRIC Co., a lorporation, lames M. Gilchrict, Agent,

FEDERAL ELECTRIC CO., a Corporation, James M. Gilchrist, Agent,

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387 I.A. C16

MR. JUSTICE GERGL DELIVE OF THE LPINION OF THE LUBBY.

Con February 18, 1925, the plaintiff instituted suit against the defendant, adapting, among other things, in its filed estatement that this defendant was indebted to it in the sum of 'Ill for renewal premiums with reference to a bond hardtofore given to the City of Chicago, pertaining to an electric sign located at 7025 Lincoln avenue, Chicago, Illinois; that there after the defendant, Federal Electric Co. entered its appearance, and an order was issued by the Municipal Court of Chicago, giving loave to this defendant to make Harry Lang, and down Furniture Kart, Inc. third party

That there is filed in the wunidisel Jourt by the Hirtfor Accident & Indeanity Co., Isintiff, a copy of an indication for the indeanity bond involved herein, wherein the federal alectric Co. sgreed to pay to the Martford Accident & Indeanity Co. the sum of 30 premium upon the execution of the bond, and So on the 14th day of May in each year thereafter until the Federal Flectric Co. shall serve upon the Hartford Accident & Indeanity Co. at its bone office,

competent written legal evidence of its final discharge from such bond and all liability by reason thereof, and that the said Federal Electric Co. will, at all times, indemnify and keep indemnified the Hartford Accident & Indemnity Co., and hold and save it harmless from and against any and all damages, loss, costs, charges and expenses of whatsoever kind or nature, including counsel and attorney fees, which the surety, to-wit: Hartford Accident & Indemnity Co. shall at any time sustain or incur by reason or in consequence of having executed said bond.

The defendant Federal Electric Co. filed in the Municipal Court of Chicago, the statement of its claim, impleading said Harry Lang, and stated in substance, among other things, that according to law, equity and good conscience the premiums should be paid, together with any other proper charges, by Harry Lang and the said Roman Furniture Mart, and prayed that judgment be entered against the defendant Harry Lang and the Roman Furniture Mart in the sum of \$111.

On March 19, 1935, an affidavit of merits was filed by the defendant Federal Electric Co., wherein it claimed that the premiums should be paid by Harry Lang and the Roman Furniture Mart.

On November 14, 1935, a judgment was entered in favor of the Hartford Accident & Indamnity Co. and against the Federal Electric Co. in the sum of \$60. and at the same time a judgment was entered in favor of the Federal Electric Co. and against Harry Lang, the third party defendant, in the sum of \$80.

From an order entered on March 13, 1936, it appears that the suit was dismissed as to the defendants, James M. Gilchrist and the Roman Furniture Mart, third parties defendant, and the judgment was amended changing the amount against the Federal Electric Company, the original defendant, to \$80., and assessing the same amount against Harry Lang.

competent written leg I evidence of the like of the from auch bond end all liability by resent thereof, and that the said federal liestric Co. will, the all times, insendify and keep indentified the Hartford Accident a Indentity Co., and hold and save it thereiess from and against any and all deargas, loss, costs, obst as expenses of shatecever kind or nature, including commet and etternices, which the surety, to-wit: Hartford Accident : Indentity Jo. shates any time sustain or incur by reseat or in consequence of nature executed said bond.

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On Merch 12, 1975, an affidavit of merits was riled by the defendant Mederal flactric Co., wherein it claimed that the premiums should be joid by Marty mong and the constitute that.

On howerber 14, 1925, the sent a entire of an factor of the Martford Accident a lademnity be, and the constitute of the sent of the lederal alectric to the man judgment and the sent of the lederal alectric to. The man judgment and the sent of the lederal alectric to. The man in the sent of the lederal alectric to. The man institute of the lederal alectric to. The man institute of the lederal alectric to. The man institute of the lederal alectric to the sent of the lederal alectric to. The man of the lederal alectric to the sent of the sectors of the se

From an order entered on terch is, 1979, ... Johnst the the suit was dismissed as to the definients, James W. Michighent the Roman Furniture Mart, third corties detendent, ... the juigment was amended changing the arount and instance the sederal structuc Jompens, the original defendent, to .80., and casessingthe a me securit against Harry Lang.

The appeal is in this court by Harry Lang from a judgment of \$80 entered against him as a third party defendant in the proceedings heard in the Municipal Court.

The claim of the plaintiff for the amount of the judgment is admitted by the original defendant, and from the record it is apparent that under the terms of the application for the surety bond the original defendantwas never released from its obligation to pay the premiums as they accrued from time to time to the plaintiff.

It is to be noted that there is a provision in the contract for steps to be taken by the original defendant, the language of which is as follows:

"That the undersigned will pay to the Surety \$30.00 premium upon execution of the bond, and \$30.00 on the 14th day of May in each year thereafter and until the undersigned shall serve upon the Surety at its Home Office, competent written legal evidence of its final discharge from such bond, and all liability by reason thereof."

By defendant's admission that it was liable to the plaintiff, we are led to the conclusion that no steps were taken under the provision of this contract which would release this defendant, and it would seem that this proceeding is subject to certain rules adopted by the Municipal Court whereby a defendant, in a proper case, may make application to add a third party defendant to the action.

In the first place as we view the record, the contract is between the plaintiff and the original defendant, and the defendant acquired title to the sign subsequent to the signing of the agreement between the plaintiff and the original defendant.

The ground upon which the Federal Electric Co. seeks to recover is that in equity and good conscience Harry Lang, a third party defendant, should pay the premiums.

However, the defendant Federal Electric Co. makes the point that Harry Lang did not file any defense or affidavit of

The appeal is in this court by Herry Lang from a judgment of \$80 entered against him as a third party defendant in the proceedings beard in the Municipal Court.

The claim of the plaintiff for the amount of the judgment is admitted by the original defendant, and from the record it is apparent that under the terms of the application for the surety bond the original defendantwes never released from its coligation to cry the premiums as they accrued from time to time to the claimiff.

It is to be noted that there is a provision in the contract for steps to be taken by the criginal defendent, the language of which is as follows:

Thet the undersigned will pay to the Burety \$20.00 premium upon execution of the bond, and \$30.00 on the lith day of May in such year thereafter and until the undersigned shall serve upon the Surety at its Home Office, competent written legal evidence of its final discharge from such bond, and all liability by reason thereof."

By defendant's admission that it was liable to the plaintiff, we are led to the conclusion that no steps mare to ken under
the provision of this contract which would release this defendant,
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However, the defendant !aderal Fleetric Co. makes the point that Harry Lang did not file any defense or affid wit of

merits to the statement of claim of the Federal Electric Company. While he was not required to do this, still this court is obliged to assume in this, a fourth class case where evidence was heard by the court, that the court, upon considering the evidence before it, was justified in entering the judgment, and we as a court of review cannot in the absence of a bill of exceptions containing the evidence, determine from the record whether or not the trial court was in error. Therefore it will be presumed that the evidence was sufficient to sustain the finding of the court, and that the judgment should not be disturbed.

In a case of this classification, the rule is that the evidence introduced will control in determining the issues between the parties, notwithstanding the statement of claim.

The questions called to our attention by the third party defendant are interesting, but not having a complete record and our decision necessarily depending upon the evidence, we are not in a position to determine that the court erred; on the contrary, where the evidence is not preserved, this court will, as heretofore stated, assume that the court heard proper evidence to sustain the judgment.

For the reasons stated, we are of the opinion that the judgment should be affirmed. Accordingly the judgment is affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN, P.J. AND HALL, J. CONCUR.

merits to the statement of ciris of the secend ilectric lawpany. While he was not required to it this, still tess court is abliged to assume in this, a fourth almee case where evidence mea neard by the court, that the court, upon considering the evidence before it, as the court if retieves justified in entering the judgment, and we as court of retieves cannot in the absence of a bill of exceptions countring the evidence determine from the record whether or not the trial court was in error. Therefore it will be presumed that the evidence was sufficite sustain the finding of the court, and that the judgment should not disturbed.

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For the ressons stated, we are of the opinion to t the judgment should be affirmed. Accordingly the judgment is affirmed.

DENIS E. SULLIVAN, P.J. AND MALL, J. CTOU.

38762

J. P. ROGERS.

Appellee. MAURICE L. COWEN,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

287 I.A. 6171

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from an order of the Municipal Court of Chicago denying his motion to vacate a judgment by confession.

On November 25, 1935, the plaintiff filed his cognovit and obtained judgment against the defendant for \$65 on two judgment notes, each in the sum of \$25. On December 11, 1935, the defendant filed his motion to vacate the judgment, and in support of the motion filed his verified affidavit. After argument the court denied the motion to vacate and set aside the judgment,

The verified affidavit filed in support of defendant's motion to set aside the judgment states that on November 25, 1935, judgment by confession was entered by the court, and that on November 29, 1935, the bailiff returned an execution nulla bons.

Garnishment proceedings were then instituted by the plaintiff and the defendant received a notice from his bank of the entry of the judgment and that summons in garnishment had been served on it,

The affidavit further states as a defense to plaintiff's claim that the notes sued upon were executed by the defendant and delivered to the Macklam Refrigerator Sales and Service Company as part of the purchase price of a refrigerator; that the plaintiff

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J. P. 2006-93,

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MAURICE I. CONEM,

Appellant.

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237 I.A. 613

MR. JUSTIDE HEALE DELIVE DE AL OPTION OF THE DURING.

This is an appeal by the defendant from in order of the Municipal Court of Chicago tenying his action to ranks a judgment by confecsion.

On November 35, 1935, the pirintiff filed his cognerit and obtained judgment against the deformant for 885 on two judgment notes, each in the sum of .75. On December 11, 1935, the defendant filed his motion to value the judgment, and in support of the action filed his verified affidavit. After arounded the action to vecified affidavit. After arounded the action to vecife and set aside the judgment.

The verified effidavit filed in support of letend inthe motion to set aside the judgment as tes that on Lovember 25, 1935, judgment by confession was entered by the court, no that enknowember 23, 1935, the bailiff returned an execution nulls cons.

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The affidavit further at the stade to address to address claim that the notes sued open were executed by the defendent and delivered to the archimal fairing rator with and service coapmy as part of the jarches price of a refriger ter; that the plaintiff

the purchase price of the refrigerator was \$180, of which the defendant paid \$80 at the time of the sale, and signed and delivered to this Company four notes in the sum of \$25 each, payable to the order of the Macklam Company in monthly installments; that at the time of the sale it was agreed between the defendant and the Macklam Company, in the presence of the plaintiff, that should the defendant return the refrigerator within forty-five days of the sale, any unpaid balance of the purchase price would be cancelled, and that the plaintiff, as the agent of the Macklam Company would attempt to resell the refrigerator; and that if no loss resulted, the money paid by the defendant would be refunded. It is further stated by affiant that within forty-five days of the sale the defendant returned the refrigerator to the Macklam Company and the Company accepted return of the refrigerator.

It is further stated by affiant that after the sale referred to, the plaintiff left the employ of the Macklam Company and plaintiff obtained the two notes sued upon by the exercise of duress upon one of the officers of the Macklam Company; that the notes payable to the order of the Macklam Company had never been endorsed by any authorized representative of the Company, and that the endorsement appearing on the said notes was in effect a forgery.

As a general rule, a judgment by confession will be set aside by the court in order that the defendant be given leave to defend upon a motion promptly made and supported by an affidavit, provided the affidavit sets forth a good and meritorious defense to the claim. This motion to open or vacate the judgment by confession so as to allow defendant to plead a defense is addressed to the sound discretion and to the equitable powers of the court, provided that the motion is supported by affidavit or other evidence tending to show that applicant has not been guilty of laches.

was the selection of the Mooklam Joneany in this transaction; that the purchase price of the reference as \$180, of which the defendant paid \$80 at the time of the cale, and signed and delivere to this Company four notes in the sum of the crob, payable to the order of the Macklam Company in monthly installments; that at the time of the sale it was agreed between the defendant and the Macklam Company, in the presence of the plaintiff, that should the defendant return the refrigerator within forty-five days of the sale, any unpaid belance of the purchase uries would be concented, and that the plaintiff, as the agent of the Macklam Company would attempt to resell the refrigerator; and that if no loss resulted, the money paid by the defendant would be refunded. It is further stated by returned the refrigerator to the Macklam Joneany and the Company returned the refrigerator to the Macklam Joneany and the Company returned the refrigerator to the Macklam Joneany and the Company returned the refrigerator.

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As a general rule, a judgment by confession will be set aside by the court in error that the defendant as given lave to defend upon a motion promptly made and supported by an affidavit, provided the affidavit sets forth a good and meritorious defense to the claim. This motion to open or vacate the judgment by confessed to the allow defendent to place a defense in addressed to the sound discretion and to the equitable nowers of the court, provided

that the motion is supported by affidevit or other evidence tending

From the facts as they appear in the affidavit, it would seem that as soon as the defendant had notice of the proceeding and was advised by his bank of the entry of the judgment and that garnishment proceedings had been instituted against his bank account, he presented this motion.

The question then arises whether by the affidavit filed in support of his motion, the defendant presented facts tending to show that he had a good and meritorious defense to plaintiff's claim.

From the affidavit of the defendant it appears that there had been an oral agreement between the Macklam Company and the defendant that should the defendant decide to return the refrigerator within forty-five days, the Macklam Company would accept the return, and that the plaintiff as its salesman would attempt to resell it and if no loss resulted, the money paid on account by the defendant would be returned. This defense is based on a sale upon a condition subsequent and a mutual rescission by the parties when the refrigerator was returned and accepted by the Macklam Company. In the opinion in Fuchs & Lang Co. v. Kittredge & Co., 242 Ill. 88, the court said:

"The rule (that parol evidence cannot vary a written agreement) is a familiar one, but it is subject to the qualification that a separate parol agreement as to any matter not inconsistent with the terms or legal effect of the written agreement, and on which it is silent, may be shown, where it appears that the written instrument was not intended to be a complete and final statement of the whole transaction between the parties."

This rule is further illustrated in the case of <u>Drosdoff</u>
v. <u>Fetzer</u>, 178 Ill. App. 336, called to our attention by the defendant.
The court in passing upon the claim presented held that where there
is a rescission of a contract by mutual consent, the parties should
be put by each other as nearly as possible in "statu quo ante, etc.,"
and the law will compel a final adjustment to this end where only
a part of it has been made.

erom the 1 of source the defendent of the affid vit, i cold seen that he soon as the defendent of the nutice of the properties and that was advised by his bonk of the entry of the judgment and that germishment proceedings had even instituted applications account, he presented this action.

The question then wrises shother or the offic rit filed in support of his action, the defendant sessible ore tending to snow that he had a good and seritorious defense to lainting a claim of the followed it asserts that there

had usen an oral egreenout letters the cooking low my and the defendant that should the defendant leaded to return the refrigerator within forty-five days, the decolem longway rould accept the return, and that the plaintiff at its valuement mould attempt to result it and if no lose required, the soney paid on account by the defendant would be returned. This effect is brosed in a sile upon a condition subsequent and a number that results is sone to by the facilism when the refrigerator was returned and occurs by the facilism company. In the opinion in ruche a land Co. v. Eltirodre 2 20.,

"The rule (that pero) evidence cannot very exitted agreement) is a familiar one, but it is subject or the qualification thit a deparate perol opposit as a say matter not inocasistant with the treat or legal affect of the rritten agreement, and on where it species that a silent agree not intended to be a complete or itself action of the rule and the rule period of the rule of

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v. <u>Tetser</u>, 178 Ill. App. Whi, entired a cour attention is the defende

The court in passing upon the claim are reprededucted the where there
is a resolution of a contract by matural consent, the mattles abould
be put by each other on meanly as consints in assturing attentions.

and the law will compete a final adjustment to this and shore only

a part of it has been ande.

Again, in the case of Green v. Ryan, 242 Ill. App. 466, Ryan sold a cow to Green. Being dissatisfied with the breeding qualities of the cow, Green returned her to Ryan, and filed a suit to recover the purchase price. In affirming a judgment for Green the Court said:

"The inference is clear from the evidence that the contract of sale involved, after the return of the cow to the appellant, was treated by both parties as rescinded, and the permanent retention of the cow by the appellant without any explanation to the appellee,

* * justifies the conclusion that the appellant regarded the sale as rescinded * * * and that the cow had again become his property."

So far as the facts have been presented to the court upon this motion, it appears that the Macklam Company accepted the return of the refrigerator, and under the law the defendant is absolved from liability on the notes, for the reason that the plaintiff was not a holder in due course of these notes, but had knowledge of the agreement between the parties and the acts leading to the rescission of this contract.

It is also contended that the endorsement of the notes was not authorized by the payee, but was a forgery, and that the plaintiff was not entitled to recover for the amount of these notes. However, since we are of the opinion that the defendant has a defense which should be submitted, we express no opinion upon this question, but consider only such facts as are sufficient to grant leave to the defendant to offer his defense and the judgment to stand as security.

For the reasons stated the order of the court denying the defendant's motion is reversed and the cause is remanded with direction that the defendant be granted leave to defend, the judgment to stand as security.

REVERSED AND REMANDED WITH DIRECTIONS.

Agein, in the case of reen v. iven, 'AR III. Art. 458, 458, 87 an evid rose to treen. Being disabliated and the breating qualities of the cos, orean returned terms, and files a suit to recover the pureline price. In filtring a judgment for Green the Gourt said:

The inference is clear from the evidence that the contract of said involved, elter the return of the contract of she involved, elter the return of the coveraged covered by both wreak, and the permanent retention of the coverent the specificat elter, any exchangeing to the clear factifies the conclusion that the said the conclusion that the said the dar had again become his property.

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It is also contended tont the enformement of the neterage not authorized by the payer, but on a forgery, and that the plaintiff was not entitled to recover for the amount of these not of downs of the enforce we are of the opinion that the defendant are a lefent which should be submitted, we exterm no opinion untains an entity, but consider only such increase are sufficient to that he stendant to offer his defense and the judgment to atend of security.

For the reasons at the order of the centrocaring the defendant's motion is reversed and the cense in a canden site itest that the defendant be granted reare to deland, the judgment to atomb

REVERSED AND THE CARONAT TO BE SUCHES 19.

38776

MARIONA ENGELIS.

Appellee,

V.

DOUISETTE ENZELIS, since remarried and now known as DOMICELE MARTISIUS,

Appellant.

APPEAL FROM
MUNICIPAL COURT

287 I.A. 617²

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from an order entered in the Municipal Court of Chicago, denying leave to the defendant to plead to a judgment entered by confession, which was based upon a promissory note in the possession of the plaintiff.

On July 25, 1935, the plaintiff filed a statement of claim based on a judgment note signed by the defendant, upon which confession of judgment was entered by the court in the sum of \$3,483.09.

In the verified petition of the defendant for leave to defend, it is stated that there was no consideration for the execution of the note on which judgment was confessed, and also that \$900 interest had been paid by the defendant to the plaintiff, for which no credit was given.

It is further stated that on the face of the note plaintiff was entitled only to the principal sum of \$2,000, plus interest at five per cent per annum from August 27, 1925, to July 25, 1935, a period of less than ten years; that the amount due for principal and interest for the period set forth would amount to the sum of \$2,991.24; that the judgment entered was for \$3,237.71, plus \$244.38, attorney's fees, making a total sum of \$3,482.09, and that the judgment on the face of the record is excessive in at least the sum of \$346.47.

Upon the question of diligence of the defendant in making

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MARIONA MANIELLES.

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DOUISTTW vis.LIS, since remerried and now known as abstract offill.

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d.A.I.T.J.

MR. JUSTICK REAL AND INC. OF THE OFFICE OF THE OFFI

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In the veri lead patition of the overnous of the verd derend, it is stated that there was no consider verson as a second of the note on which judgment was conferency, one also so the later had been paid by the defendant to the old old of the condition.

It is further at ted the sum ter [0] the note of intiff was entitled only to the principal adm of , 0 , plu 10 .000 % of per cent per amum from Acquet 77, 1935, to July 1, 1875, 1876, 1876 less than ten years; that the request does for the period art forth would amount to the real of , 1, 1, 1, 10 the judgment entered was for 2, 771, plus 11, 1, 1 the judgment entered was for 2, 777, plus 11, 1, 1 the forel sum of 3,488.03, and the feeled are sum of 3,488.03, and the record is excessive in at least the sum of 36.5%.

Upon the rungtion of dilinger of the test to the him

application for leave to appear and file a defense, it appears that she did not know judgment was entered until August 8, 1935, when an execution was served upon her; that immediately thereafter she employed one known as Fraelig, who represented himself to be an attorney, and who as an attorney was to take care of her interest in the matter; that at that time this alleged attorney presented her with a card, which was in the usual form used by attorneys, with his name as an attorney at law, telephone and street number; that she paid a retainer fee of \$25, and later, \$75, making a total of \$100, to represent her in the matter; that she is a woman of foreign birth, not conversant with the English language, and assumed that her interests were being protected; that on September 21, 1935, she received a letter from plaintiff's attorney, and immediately tried to locate her attorney, but was unable to do so. Thereafter the attorney now appearing before this court was employed.

The plaintiff urges that there was a lack of diligence on the part of the defendant in applying to the court for an order permitting her to offer the defense set forth in her affidavit of facts appearing in this record. The defendant urges that she made nine payments of \$100 each for interest due and payable under the terms of the note in question, and that she received no consideration for the execution of the note, and she states in her affidavit that she signed the note because of the persistent urging of a sister-in-law who had loaned the money to her brother, since deceased.

The fact that the defendant signed the note evidencing such loan, and the question of whether the affidavit correctly states what took place, are questions of fact for the court or a jury, and our only purpose in discussing the facts is to determine whether the court erred in not granting leave to the defendant to offer such defense as she set forth in her affidavit.

empire then for leave to speem and file a december, it so are that and did not know judgment was entered upon her; that immed telly thereafter she smployed one known as breelf, who representes almost to be an attorney, and who as an attorney was to that our of his interest in the matter; that at that time this alleded atterney presented not which was in the outlatform upon the electromy of the aim with a cerd, which was in the outlatform and the electromy of alled not name as an attorney at law, telephone and attract maner; not aim paid a retainer fee of AZE, and later, 775, anding a total of alphoto represent her in the matter; that she in a comen of foreign cirth not conversent with the impliesh language, and assumed that her interests were being protected; that called testering alter from plaintiffs attorney, and insentent time the steam locate her attorney, but was unable to do so. Thereafter the attorney locate her attorney, but was employed.

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The first that the defendrat signed the note eximple sultann, and the question of whether the officent correctly an testing took place, are nuestions of feet for the court of any, and our only purpose in discussing the feets is to discussing the feets is to discussing the entering the defense error in not granting leave to the defendent to differ much defense as she set forth in her affiliation.

tation of interest, and that the judgment was for a larger amount than she was entitled to recover. This, together with the fact that there is the statement that defendant had been paying interest for a period of nine years, for which she had received no credit, in and of itself is sufficient to justify the court in granting leave to the defendant to file a plea in defense, and failure to grant such leave was error.

From these facts alone, we are of the opinion that the defendant is entitled to present her defense, and by reason of plaintiff's admission that the amount is larger than she is entitled to recover, the judgment is reversed and the cause is remanded to the trial court with directions to enter such other and further orders as may be consistent with the views herein expressed.

REVERSED AND REMANDED WITH DIRECTIONS.

DENIS E. SULLIVAN, P.J. AND HALL, J. CONCUR.

The plaintiff similes to there was error in the commutation of interest, and test the judement was for a larger sucint than she was entitled to recover. Thus, together with the first there is the structured test design of the part test test design of the parts, for which she had recovered no applit, in an of itself is sufficient to justify the accurt is conting large to the defendant to file a pice in dashes, or a line and auch leave see error.

From these firsts viewe, we get it the original that the defendant is entitled to aresent the defense, at op merson of plaintiff's admission that the understands a larger than she is entitled to vecover, the judgment is reversed, and the peace is remanded to the trial court with directions to enter such ather son further orders as may be consistent with the riems herein expressed.

DENIS E. SULLIVIA, ... J. AND MALL, J. CONCUP.

38811

PEOPLE OF THE STATE OF ILLINGIS,

.

HARRY STROM,

Plaintiff in Error.

ERROR TO THE

CRIMINAL COURT

COOK COUNTY.

287 I.A. 6173

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This case is in the court upon a writ of error brought by the defendant to have reviewed the record of the Criminal Court of Cook County, wherein it appears that the defendant was indicted on June 21, A. D. 1934, upon three counts, as follows:

The first count charged the said defendant with having made an assault with a pistol upon one Walter Garazin, on May 22, 1934, in County of Cook and State of Illinois with intent to kill and murder said Walter Garazin; the second count charges said assault was with intent to inflict a bodily injury, with a pistol; and the third count charges said assault with intent to inflict a bodily injury, with a certain hard substance.

Upon a hearing of the crime alleged in the indictment, the jury on October 8, 1934, found the defendant guilty of assault with a deadly weapon with intent to inflict upon the person of another a bodily injury. Subsequently, on October 16, 1934, the court over-ruled a motion for a new trial and in arrest of judgment. Thereupon judgment was entered on said date, sentencing the defendant to the House of Correction for one year, and to pay a fine of \$200.

From the facts it appears that on May 23, 1934, while one Edward Perlowski was at his home on the first floor of 2343 West Iowa Street, Chicago, Illinois, at about 12:30, he heard a loud report, after which he went to the kitchen of his dwelling and saw that plaster was down from the ceiling; that the landlord was called and

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PROPILE OF THE STOR OF LIBERTY. Asfendant in Error. * V HARRY STROM. FTAUGE LOTE Plaintiff in Error.

.TROUGHT TO A ITTED WERT CONSTRUCT BREAK OFFICE. AM

This case is in the court mean a writh of error prought or the defendant to have reviewed the record of the initial lourt of Cook County, wherein it saveres the defendent was indicated an June 21, A. D. 1834, upon three counts, as fulless:

maived dair the baseled birs sat begreat amon taxit adl made an assault with a clatch bronche clater Gerein, on try o 1834, in County of South and State on Illinois with intent to will and murder said whiter U ratin; the second court oh res said assault was with intent to inflict a bouily injury, tith a bistol; and the third count oberges said as with with intent to inflict a bodily injury, with a certain hard subst nec.

Upon a her ring of the orine . Liegod in the indictment, the jury on October 8, 1334, found the defendant winter of manut with a deadly weapon with intent to inflict upon the crops of morner a bodily injury. Tubsenuently, on School Li, 1584, the rourt overruled a motion for a new trivi and in arrest of july ment. Thereu on judgment was ontered on arid date, dentending the describe to the House of Correction for one year, and to a y fine of .. 200. From the facts it a re rs that on dry a, 1954, tile one

Edward Perlowski wis this tome on the first floor or 5345 ett low Street, Chicago, Illiania, et cout 18:70, he heard e loud re ort, efter which he went to the kitchen of his deelling and any that plaster was down from the celling; that the lendord and called and

he came and looked at the condition of the kitchen and called the police. Upon arrival the police officers went to the second floor of the building, where the defendant lived with his family consisting of himself, a child five years of age and the maid.

From the facts it appears that the defendant while examining a rifle owned by him to learn whether or not it was loaded, accidently discharged the bullet therefrom, which penetrated the floor of the kitchen and passed through the ceiling of the first floor in a diagonal direction and entered a side wall; that the police who were called appeared at the back door of defendant's apartment and knocked for the purpose of gaining admittance. Shots were fired, but the evidence is in dispute as to just how or by whom.

Walter Garrison, one of the police officers, testified that when he appeared at the back door on the second flow for the first time and knocked, there was no response; that he returned to the first floor and examined the kitchen, the room in which it is claimed the shot was fired from the rifle in the hands of the defendant, penetrating the ceiling and striking the wall. After completing his examination he returned to the second floor and rapped on the back door and said, "We are police officers." In reply heheard "Get away from there," and the witness said, "We want to talk to you," and heard the answer, "Get away if you know what is good for you." Then the witness testified he heard someone say, "Leave them in," and the police officers said, "What is the matter with you? Leave us in. We are police officers. We want to talk to you;" that a woman answered and 5 shots were fired through the door, but did not strike any of the officers.

In response to a call from these officers, five or six more squad cars came, and the officers then broke into the apartment and threw in tear bombs, and finally entered and arrested Anton Mrozek,

whom.

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In response to a call from these officers, five or six more squad cars came, and the officers then broke into the apartment and three in tear bowbs, and finelly entered and arrested Anton Mrorek.

who was visiting the defendant at the time. They also arrested the maid and the defendant, and from the record it appears that both the defendant and his friend Mrozek were assaulted by the police, and that the defendant was taken to the Bridewell Hospital, where he was given first aid for the injuries he received when assaulted by the police after he was arrested.

On the witness stand the defendant stated, which does not seem to be contradicted, that when he heard the knocking on the back door he said he could not open the door, for them to come around to the front door so he could see who they were; that the reason for this was at one time some men called at his home where he previously resided and stated they were police officers and wanted to see something; that he was away, but the maid, Rose Kuklewics, was there: that he made a report of this occurrence to the 29th Police District. and also reported the license number of the car in front of his house. and he was informed by the police that the car had been stolen; that he refused to admit them because of this experience, and because he was not sure they were police officers, and asked them to step around to the front of the building so he could see them. During the conversation an attempt was made by the police to enter defendant's premises. They admitted they had no warrant for anyone occupying the premises and that they had no knowledge a felony had been committed.

There is evidence tending to show shots were fired from the back of the house into defendant's premises; that the maid fired three shots from take small revolver and was stopped by the defendant, who told her not to shoot, for the men might be police officers; that it was thereafter the tear gas was thrown into the premises by the police and the defendant was arrested.

These are substantially the facts as they appear in the record.

The question arises was the jury justified in finding

who was visiting the defendent of the time. They of an exert of the maid and the defendent, and from the record if the theology the defendent and his friend Wrosek were resoluted by the viles, and that the defendent was taken to the orthewell partial, here engineering that the defendent was taken to the orthewell partial of the injuries of received than accounted by the police after he was arrested.

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These are substantially the facts as they abover in the

record.

the defendant guilty, beyond a reasonable doubt, of firing these shots to inflict a bodily injury with a pistol.

The defendant calls our attention to the case of <u>The People</u>
v. <u>Lavac</u>, 357 Ill. 554. In that case two police officers with a
warrant for the arrest of Lavac, appeared at his home in Berwyn, and
Lavac killed the two officers while they were trying to force an
entrance into his home. It was conceded that Lavac fired the shots,
but the contention was made that the shots were fired in the
necessary, or apparently necessary, defense of himself, his family
and habitation. The court said:

"Lavac testified he was not acquainted with Svec and did not know that he was a police officer. He said he was at home with his family on the evening in question preparing to take a bath; that his wife told him that someone was at the kitchen door; that he was aware that hoodlums had been active in the neighborhood and upon going to the door took his pistol in hand; that the inside kitchen door and the outside storm door were both closed; that without opening the door he made inquiry of the persons outside, and was dold, in substance, to open the door or they would break in or shoot in. Thereupon he said they immediately fired through the door and he returned the fire. After the firing ceased he said he went out on the back porch, where he saw some people standing and asked that they call the police. When the police arrived Lavac was in the living room and his wife and three children were around him. When asked who did the shooting he said, 'Mans come to house and I shoot.' This was corroborated by the testimony of his daughter, Marian."

The purpose of calling our attention to this language is to point out the similarity in the cases. In the instant case the officers did not have a warrant for the arrest of the defendant, but were acting upon information that a shot had been fired, and had penetrated the ceiling of the first floor apartment, indicating that the shot was from the second floor. There was no evidence that the police had seen the defendant commit any misdemeanor or other crime. What really happened was largely a question of fact for the jury.

the defendant guilty, beyond resonate toost, of Iria, "Lese sacts to inflict a codity infery with a detail.

The defendant onlis our ettention to the T we of The cross v. Lovee, SD7 111. 554. In that does two colice officers with a warrent for the errest of a vec, some red at his does in derays, and Lavac killed the two officers while they more trying the force in entrance into his home. It was conceand that here of the shots, but the contention was made that the shots were fired in the necessary, or apparently necessary, detenge of sideal, his family and habitation. The court seid:

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The purpose of calling our attention to this I number is to point out the similarity in the cases. in the instance of the cutting officers did not have a warrant for the except of the letter of the but were acting upon information that shot had over ited, and had penetrated the ceiling of the first floor apparent, initially that the shot we from the second floor. There were no will see that the police had seen the defend in condit any visite can remediate the cities. That the shot was largely a mostion of the forther the crime. That really happened was largely a mostion of the forther dury.

The defendant testified he had not fired any shots, and the maid Rose Kuklewicz says she is the one who was guilty of firing the shots and that the defendant told her not to fire because the men might be police officers. The only evidence in the record tending to show the defendant fired the shots is the testimony of Anton Mrozek. However, when we come to examine the evidence of Mrozek it is apparent that at one time during the examination he made the statement in court that the defendant did not fire any shots; that he went to the front room and did not see anything. Afterwards, on cross-examination by the People, when he was asked if he did not make the statement at a certain place that the defendant fired the shot, he said, "Yes, I tried to explain."

The witness Mpozek was called as a court witness and crossexamined by both parties to the litigation. The contention is made that it was erroneous to permit the State's Attorney to question this witness as to the statement made by him in the absence of the defendant regarding what occurred at the place in question. The question is whether the statement of a witness called by the court, made in the absence of the defendant, can be used for the purpose of impeachment. The People in reply to the contention of this defendant urge upon this court that from the record it does not appear objection was made as to the right of the People to impeach a witness because of statements made by the witness contradictory to the testimony now before the court, and it would appear from an examination of the objection made by the attorney for the defendant that the objection was concerning the form of the examination from an alleged statement. The witness was interrogated as to what was said at a certain time and asked whether the statement called to his attention was made, which was proper for the purpose of impeachment, and we are satisfied that the evidence elicited by such question was competent.

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The witness Mrosek was colled as a court situass and crossexamined by both parties to the litin tion. The contention is ands that it was erroneous to permit the Chate's Attorney to question this witness as to the statement made by him in the become of the cannot regarding what occurred at the place in question. ine mestion is whether the statement of a witness walled by the nourt, ande in the absence of the defendent, onn be used for the areas at imperchant. The reals in realy to the contention of this it is trye on this court that from the reasond it does not a read that true of as to the right of the Pacyle to lace oh " lithe a because of st tements made by the witness contradictory to the test cony now before the court, and it would appe r from an examin tion of the cojection mede by the attorney for the defendant the the objection are converm the form of the examination from un all god at to unt. The ith as w interrogeted as to what we said to cortain that en is cal whether too statement called to his attention was made, which a rover for the purpose of impeachment, and we are satisfied that the evi ence

elicited by such question was competent,

However, the real question here is whether the defendant assaulted the police officers in the manner alleged in the indictment. The maid testified that she did fire the shots, and the prosecution contends that five shots were fired. If this is so, then they were fired by the maid, for there is no evidence in the record contradicting her evidence. Whether or not the officers were justified in entering the premises in the manner alleged was a question for the jury to determine. There is no evidence other than we have indicated that the defendant fired the shots, except the testimony of Mrozek, which is not very clear.

We believe there is not sufficient evidence to establish beyond a reasonable doubt that the defendant was guilty of the charge alleged in the indictment, and for the reasons stated in this opinion the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

DENIS E. SULLIVAN, P.J. AND HALL, J. CONCUR.

However, the real rubstion here is dether the defendant assembled the police officers in the maneralle ed in the indictmen. The maid testified that she did fire the description contends that five abots were fired. If this is so, then they were fired by the maid, for there is no evidence in the record contradicting her evidence. Thether or not the officers tere justified in entering the remises in the menner alleged was a meation for the jury to determine. There is no evidence other than we have indicate that the defendent fired the snote, except the testiming of frozek, which is not very clear.

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DAVIS E. BULLIVAN, E.J. A O HALL, J. C. CONTRA

38978

OLD FORT DEARBORN WINE & LIQUOR CO., a Corporation,

(Plaintiff) Appellee,

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OLD DEARBORN DISTRIBUTING CO., a Corporation,

(Defendant) Appellant.

INTERLOCUTORY APPEAL

FROM CIRCUIT COURT

COOK COUNTY.

287 I.A. 6174

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

of the court granting a temporary injunction based on plaintiff's original and supplemental bills of complaint, wherein it is charged that the defendant's acts violated the provisions of the Illinois Fair Trade Act (Ill. State Bar Stat. 1935; Smith's Stat. 1935).

The legality of this act was approved by the Illinois Supreme Court in the case entitled, Joseph Triner Corp. v. Carl W. McNeil, Dooket No. 23475, and again in the case entitled, Seagram-Distillers Corp.
v. The Old Dearborn Distributing Co., Docket No. 23531 - April, 1936.

The injunctional order restrains the defendant from directly or indirectly advertising for sale at retail, offering for sale at retail or selling at retail in the City of Chicago certain brands of whiskies distributed by the plaintiff, known as "Cream of Kentucky" and "Wilken Family Blend," below certain prices fixed by the order.

A motion was made in this court by the defendant to consolidate the instant appeal with the pending appeal in the case of Old Fort Dearborn Wine & Liquor Co., a corp. v. Old Dearborn Distributing Co., a corp. Gen. No. 38931, which motion was denied. Subsequently, upon the suggestion of plaintiff that there be a

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CLD FORT DEARBORN BINE & BIQUUE CO., a Corporetion,

(Plaintiff) Amelie,

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OLD DEARBORN DIST-11 WILING JO., a Corporation,

(Defendant) Appellant.

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MR. JUSTION ARREL DURING HE THE O IN IN CO. NO. IT.

The defendant by its appeal seeks to reverse the order of the court granting a temporary injunction based on disintiff'; original and supplemental bills of complaint, wherein it is obveged that the defendant's acts violated the provisions of the Illinois Fair Trade Act (Ill. State har Stat. 1935; Smith's Otat. 1935).

The legality of this act was approved by the Illinois luncame Jourt in the case entitled, Joseph Triner Corp. v. Jul. s. Lokell, Docket in the case entitled, Joseph Triner Corp. v. Jul. s. Lokell, Docket wo. 23475, and again in the case entitled, Section 135illers Ocrp. v. The Old Dearborn Distributing Co., Docket Wo. 23631 - pril, 1356.

The injunctional order restrains the defendent from directly or indirectly advertising for sale at rateil, offering for sale at retail or selling at retail in the City of Chiongo certain brands of whiskies distributed by the plaintiff, known as "Cream of Kentucky" and "Wilken Family Bland," below certain orices fi edby the order.

A motion was made in this court by the referrent to consolidate the instant appeal with the lending appeal in the case of Old Fort Dearborn line & Liquor Co., a corp. v. Old Dearborn Distributing Co., a corp. Gen. No. 38951, which notion was denied. Subsequently, upon the suggestion of plaintiff that there be a

diminution of the record in this court, the motion was allowed and the plaintiff was permitted to file an additional record. The defendant suggests that this court consider certain pages of defendant's brief filed in the case of Old Fort Dearborn Wine & Liquor Co. v. Old Dearborn Distributing Co. supra. However, only the questions raised in the record, abstract and brief of the defendant filed in the pending case and properly before this court, will be considered.

We have held in Old Fort Dearborn Wine & Liquor Co. v. Old Dearborn
Distributing Co., supra, that the Court's order granting a temporary
injunction was a proper exercise of its jurisdiction, for the
reasons stated in the opinion, and our conclusion in that case is
controlling upon the questions now before us. Whether or not the
court exercised proper discretion depends in each case upon the facts
and circumstances before the court at the time of its finding. Therefore, it is not necessary for us to point out the difference in
each of the authorities cited upon this question, for the conclusion
in all of them is that when exercising its discretion in remanding
of entering judgment, the court must depend upon the facts and
circumstances in evidence.

In <u>Old Fort Dearborn Wine & Liquor Co.</u> v. <u>Old Dearborn</u>
Distributing Co. Gen. No. 38931, we said:

"The general purpose of an injunctional order is to restrain acts which would destroy the property rights of the person or company damaged. The court has discretion under proper circumstances to enter an order to maintain the status quo between the parties until a final hearing is had. In the instant case the facts disclose that the defendant is charged under oath with taking advantage of the established good reputation of plaintiff's products known by the label used, which is a trade-mark emblem.

It is the undoubted right of a manufacturer or whole-saler to maintain a fair price for an article that has back

diminution of the record in this court, the motion was allowed and the plaintiff was permitted to rile an additional record. The defendent suggests that this court consider cert in ages of defendant's brief filed in the case of Old Fort asaborn vine filed or old Dearborn Distributing Co. suggr. Mowever, only the questions raised in the record, abstract and brief of the defendant filed in the sending older and properly before this court, will be considered.

Upon the questions sought to be recognized in this case we have held in Old fort Dearborn line & Liquor Co. v. Old Dearborn Distributing Co., supra, that the Court's order granting a temporary injunction was a proper exercise of its jurisdiction, for the reasons stated in the ominion, and our conclusion in that dose is controlling upon the cuestions now before us. Thether or not the court exercised proper discretion desends in each case upon the facts and circumstances before the court at the time of its finding. Therefore, it is not necessary for us to point out the difference in each of the authorities cited upon this cuestion, for the conclusion in all of them is that when exercising its discretion in remoding or entering judgment, the court must depend upon the facts and circumstances in evidence.

In Old Fort Dearborn line & Liouar Jo. v. Old Jearborn Distributing Co. Gen. No. 38931, we said:

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of it the record of good quality, and which is recognized as such by the buying public. This is brought to the attention of the purchaser by the manufacturer's label under which the article is sold. In order to attract the attention of buyers, publicity is necessary. This fact is apparent when it is to be observed on all sides that the merits of an article are extolled and the benefit that may be derived from the use of the advertised article.

The plaintiff sets forth in its bill the established record of goods sold by it, to the merits of which the public is attracted by its label. The customers are familiar with the known quality of the article so sold, and to further protect its rights the label used by the plaintiff bears the legend trade-mark; in other words, the label has been registered under the provisions of the Trade Mark

Statute of the United States.

From the pleadings the plaintiff has an established and prosperous business, which is based upon the sale of the goods handled at a price agreed upon by all its agents, wholesale or retail, and by its customersk for the liquor known as 'Golden Wedding' and 'Old Quaker', as charged in this bill. There is no question but that such are bound by the several agreements, but there is the question, can the defendant be controlled by the price fixed by a manufacturer or distributor not a party to any contract. This problem is not a difficult one to decide. The Supreme Court in the Triner case makes this pertinent statement:

Legislatures have long endeavored to promote free competition by laws aimed at trusts and monoplies such as the Anti-Trust act of this State, enacted in 1891, (Ill. State Bar. Stat. 1935, p. 1235, Smith's Stat. 1935, p. 1201.) It is manifest that when the General Assembly enacted the Fair Trade Act in 1935 it was attempting to modify its former policy and to adopt an economic concept which has received widespread popular approval in recent years. The gist of the theory is that the manufacturer of a trade-marked article sold in competition with articles of similar nature, who has designated a fair price at which he, as well as his distributor and retailer, can make a fair profit, has a property right in the good will towards his product which he has created, and that it is sound public policy to protect that property right against destruction by others who have no interest in it except to employ it in a misleading manner for the purpose of deceiving the public. "The basic theory on which this concept rests" observed the California Supreme Court in Max Factor & Co. v. Kunsman, 55 Pac. (2d.) 177", is that, from a social standpoint, price cutting, in the long run, adversely affects the public interest, and that the public will be adequately protected against excessive prices by the ordinary play of fair and honest competition between manufacturers of similar products." Section 2 of the California Fair Trade act, as does section 3 of our law, prohibits manufacturers from contracting between themselves to fix re-sale prices.

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The facts that appear from the allegations of the bill of complaint justified the court's order for a temporary injunction so that the status cuo be maintained between the parties until a final hearing to determine the merits of the controversy.

The conclusion reached by this court is based solely upon the facts as alleged in the bill of complaint, and the application of the law to the facts as herein indicated is not to be taken as an expression of the court upon the merits. The conclusion of the trial court can be reached only upon a final hearing."

From an examination of this case it is evident that the questions now sought to be argued have been disposed of in the case entitled, Old Fort Dearborn Wine & Liquor Co. v. Old Dearborn Distributing Co. supra. Therefore further discussion of the facts as recited in the bill and supplemental bill of complaint is not necessary.

There is however another question to be considered in the instant case, and that is, did the court err in denying defendant's petition for the removal of the case to the United States

District Court for the Northern District of Illinois, Eastern Division

The petition represents to the court, substantially, that the pending suit is a suit of a civil nature in equity, being a suit for an injunction arising under the Constitution and Laws of the United States and involving a Federal question in that it is a proceeding brought to restrain and enjoin the defendant from charging certain prices for articles of merchandise in trade and commerce in interstate commerce in which the said defendant is engaged and further involving an attempt on the part of the plaintiff to compel the defendant to enter into a combination or agreement for the fixing of prices of its interstate trade and commerce in violation of the Sherman Anti-Trust Act, Title 15, Section 1, United States Statutes at Large, Vol. 44, Part 1, and further involving defendant's rights under the fifth and fourteenth amendments to the constitution of the United States of America, where-

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under jurisdiction is invested in the United States District Court for the Northern District of Illinois, Eastern Division, and the matter in controversy exceeds exclusive of interest and costs the sum and value of \$3,000, and that the United States District Court, Northern District of Illinois, Eastern Division, has original jurisdiction of such an action.

At the time the petition was presented the petitioner tendered its bond, as provided by statute, in the sum of \$500.

It is to be noted that soon after the enactment of the Judiciary Act of 1875, it was established that whether the defendant relied on a right given by federal laws was to be determined solely from the face of the pleadings in the cause and that allegations by the person seeking a removal characterizing other pleadings as involving a federal question, would be disregarded. In the case of Tennessee v. Union & Planters' Bank, 152 U. S. 454, the rule is stated and the court quotes from New Yersey Central R. R. Co. v. Wills, 113 U. S. 249, as follows:

"The question whether a party claims a right under the constitution or laws of the United States, is to be ascertained by the legal construction of its own allegations and not by the effect attributed to those allegations by the adverse party,"

of the application for the removal of the cause to the United States District Court, the defendant attempted to offer evidence, the purpose being, so it is claimed, to prove that the whiskey bearing the trade-mark, brand or name, "Cream of Kentucky" and "Wilken Family Blend", involved in the supplemental complaint, was purchased in Kentucky, shipped to Chicago in the latter part of April and was being sold in original packages, and that, therefore, the subject-matter of the supplemental complaint involved interstate commerce, and consequently the cause was removable to the United

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States District Court. Upon presentation of the offer of this evidence, the plaintiff made objection, and the court denied the offer.

The plaintiff contends that the cause was not automatically removed by the filing of removal petition and bond, but it was the duty of the Circuit Court of Cook County to determine judicially whether the cause was removable and to retain jurisdiction if it was not.

Among the cases called to our attention is that of Madisonville Traction Co. v. Saint Bernard Mining Co., 196 U. S. 239, where the court said:

"It is well settled that if upon the face of the record, including the petition for removal, a suit does not appear to be a removable one, then the state court is not bound to surrender its jurisdiction, and may proceed as if no application for removal had been made."

and quotes from the case of Stone v. South Carolina, 117 U. S. 430, the following:

"The mere filing of a petition for the removal of a suit, which is not removable, does not work a transfer. To accomplish this the suit must be one that may be removed, and the petition must show a right in the petitioner to demand the removal."

And so the question is whether from the pleadings and the facts set forth interstate commerce is involved.

It is not proper practice in this State upon the hearing of a motion for a temporary injunction, where the defendant has not filed an answer either to the original or to the supplemental complaint, to consider evidence upon such motion. The court will consider the facts as set forth in the bill of complaint if properly verified, and may in its discretion grant an injunctional order.

Dunne v. County of Rock Island, 273 III. 53. Therefore, under the rule as laid down in the Dunne case this court on an appeal from an interlocutory injunction, where the record fails to show that any answer was filed by the defendant, will not consider evidence offered

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by the defendant in opposition to the issuance of the injunction.

From the evidence offered upon the petition for removal, it appears that the transaction did not occur in any state other than Illinois.

From this offer of evidence to sustain defendant's petition for removal, it appears that the defendant purchased 18 cases of "Cream of Kentucky" and "Wilken Family Blend" whiskey in Louisville, Kentucky, and that the cases were shipped to Chicago for the purpose of selling these whiskies at retail in Chicago. This therefore did not constitute the carrying on of interstate commerce. The whiskey which was shipped to the defendant had reached its destination in the State of Illinois, and was here to be sold to individuals in this State making such purchases. The Supreme Court of Illinois, in passing upon the question of interstate commerce in a somewhat similar case, namely, The People v. Cross Co. 361 Ill. 405, Justice Wilson speaking for the court, said:

"Whether a series of acts in a given case constitutes the carrying on of interstate commerce is to be determined by what is actually done. * * * Merchandise which has been unloaded and stored ceases to be a subject of interstate commerce and loses its immunity from State taxation or regulation. (Nashville, Chattanooga and St. Louis Railway Co. v. Wallace, 288 U. S. 249, 266; Gregg Dycing Co. v. Query, 286 id. 472; Hart Refineries v. Harmon, 278 id. 499; Susquehanna Coal Co. v. Mayor of South Amboy, 228 id. 665; Bacon v. Illinois, 277 id. 504, 516, 517; General Oil Co. v. Crain, 209 id. 211; Kehrer v. Stewart, 197 id. 60; Minnesota v. Blasius, supra.) Where the business, in its essential national aspect, has come to an end and the condition existing or the acts under consideration performed are local, they are not subject to regulation by the Federal government. (Schechter Poultry Corp. v. United States, 79 U. S. (L.ed.) 888,) but they are subject to regulation by the State. * * * It (the produce) had been withdrawn from the carriers and was not in transit. It had a situs in this State and no other destination was in the contemplation of the shippers. * * * Under these circumstances it is immaterial whether the produce remains in the original packages of the shipper or whether there has been an actual transfer by sale."

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It is to be noted from the opinion of the Supreme Court that the case of <u>Swift & Co.</u> v. <u>United States</u>, 196 U. S. 375, relied on by the defendant, was distinguished by Justice Wilson on the ground that the goods in the Swift case had not reached their final destination.

From the facts as they appear and to which we have already referred, the court properly denied the petition for removal to the United States District Court for the Northern District of Illinois, Eastern Division, for as stated in this opinion, they would indicate that the liquor was purchased by the defendant with the intention of offering it for sale in Chicago, Illinois, after it had reached its destination and been unloaded in Chicago, Illinois.

We are unable to say from the facts that the court erred in denying the motion for removal.

After a careful consideration of the facts in this case, we believe that the court in entering the temporary injunction to maintain the status quo until a final hearing be had upon the merits, was well within its discretion. Therefore the order is affirmed.

ORDER AFFIRMED.

DENIS E. SULLIVAN, P.J. AND HALL, J. CONCUR.

It is to be noted from the opinion of the Supreme Court that the case of Swift & Co. v. United States, 138 U. G. 375, relied on by the defendant, was distinguished by Justice allson on the ground that the goods in the Swift case had not reached their final destination.

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ORDER AFFIRMED.

DENIS E. SCHLIVAR, P.J. AND HALD, J. COROUR.

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GEORGE G. COBEAN,

Appellant,

V .

GUY A. RICHARDSON and WALTER J. CUMMINGS, as receivers of Chicago Railways Company; a corporation, HARVEY B. FLEMING and EDWARD E. BROWN, as receivers of Chicago City Railway Company, Calumet & South Chicago Railway Company and The Southern Street Railway Company, corporations, doing business as CHICAGO SURFACE LINES, and J. FRED BUTLER,

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

287 I.A. 618

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a judgment in favor of defendants Butler and the receivers of the Chicago Surface Lines entered upon the verdict of a jury finding both Butler and such receivers not guilty in an action for damages for personal injuries alleged to have been suffered by plaintiff in a collision between one of the receivers' street cars and Butler's automobile, in which plaintiff was riding as a guest. The declaration, filed prior to January 1, 1934, charged the receivers with both negligence and willful and wanton conduct in the operation of the street car and Butler with willful and wanton conduct in the operation of his automobile, his liability being limited under the Guest act (Cahill's 1931 Ill. Rev. Stats., ch. 95a, subsec. b, sec. 42, par. 43) to such conduct.

Plaintiff contends (1) that the verdict was against the manifest weight of the evidence; (2) that the trial court admitted

38087

GEORGE G. COREAN,

Ampellant

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GLY A. PIJHATUCH and VALTIM J. CURLTWEN, as receivers of Chicago Tailways Conpany, a corporation, HAPTAY R. PIRARN and KIWARD A. FROWN, as received of him. o City Railway C mount, C lumet A douth Chicago Railway Company and The Jouthern Treet Tailway Company, corporations, doing business at Chica C tuly C. Light, and J. Fig. BUTL...

Appellecs.

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Plaintiff contends (1) that the ver hat we are the the tend of the opidence; (2) that the trial contends to the trial contends the trial contends to the t

improper evidence at the trial; and (3) that prejudicial error was committed by the court in many of the instructions given to the jury. We deem it necessary to consider only the second of these contentions.

There was a sharp conflict in the evidence as to the facts and circumstances surrounding the occurrence out of which this action arose and as to the question of the liability of either Butler or the receivers or of both the receivers and Butler, and it was important and necessary that the rulings of the trial court on evidence should have been substantially correct and virtually free from error. (Sertaut v. Crane Co., 142 Ill. App. 49; Carlin v. Chicago Rys. Co., 205 Ill. App. 303.)

Plaintiff testified and it was undisputed that he was the managing vice president of the Butler Paper Company (Chicago division) at a salary of \$25,000 a year at the time he was injured in the collision; that he suffered no loss of salary for the time he was absent from and unable to perform his business duties by reason of his injuries; that he had invited defendant Butler and two other friends to play golf with him on the day in question at the Westmoreland Country Club, of which he was a member; and that in turn he was invited by defendant Butler to ride as his guest in his automobile from the place of business of the Butler Paper Company on West Monroe street, Chicago, to the country club, near Evanston.

It also appeared that Butler paid plaintiff's hospital and doctor bills, but Cobean acknowledged his obligation to reimburse Butler for same. Cobean, himself, paid a substantial sum for mursing services. Notwithstanding that plaintiff received his salary in full during the period that his injuries necessitated his absence from his business and that Butler in the first instance paid his hospital and doctor bills, Cobean was clearly entitled to

improper evidence at the trial; and (3) that projudici 1 or or was committed by the court in many of the instructions given to the jury. We deem it necessary to consider only the accord of these contentions.

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recover in this common law action for any permanent injuries he may have received, his pain and suffering and expenses necessarily incurred in being cured of his injuries if the liability of the receivers or Butler or of both was sufficiently established.

Under the settled law of this state the provisions of the Workmen's Compensation act are clearly inapplicable to plaintiff or the injuries received by him, and neither in the cross-examination of plaintiff nor in the presentation of their own evidence did the receivers attempt to show that the relationship of Cobean to the company of which he was the managing officer or the circumstances attendant upon his injury brought him under that act. Yet, counsel for the receivers was permitted by his interrogation of Butler on cross-examination and statements made by him in the presence of the jury, notwithstanding plaintiff's repeated objections, to inject into the case the Workmen's Compensation act, with the obvious purpose of creating in the minds of the jurors the impression that Cobean's only recourse was under that act and that he had already been fully compensated for his injuries.

A clearer understanding of what actually occurred during the cross-examination of Butler by counsel for the receivers is afforded by the following:

"Q. How long was Mr. Cobean away from his place of employment following this accident, Mr. Butler?

A. Well, some weeks. Of course, I have heard the testi-

mony and what he said, and I would say about three months.
Q. And his salary was paid by the Butler Paper Company
all the time that he was away from his employment as the result of
this accident, was it not?

A. Yes. Yes.

* * *

Q. Mr. Butler, you say that Mr. Cobean had charge of sales in Chicago for his company, is that correct, he had general supervision and had sales, did you?

A. No, I did not.

Q. Will you please tell us again what work he did?
A. I said he was managing vice president of the J. W. Butler Company, Chicago division. They have several divisions.

Q. Chicago division?
A. Chicago division.

Q. Then he had charge of sales and everything too with it,

recover in this common law action for any permenent injuries incay have received, his pain and suffering and superace assessatily insurred in being sured of his injuries if the lishility of the receivers or Butler or or both was sufficiently established.

Workmen's Compensation act are clearly inapplicable to plaintiff or the injurios received by him, and neither in the creatment on of plainti. I nor in the precentation of their cass triange to show that the relationship of Cobean to the receivers attempt to show that the relationship of Cobean to the company of which he was the managing officer or the circumstances attendent upon his injury brought the under that act. Let, counsed for the receivers was permitted by his interrogation of Butler on cross-examination and statements made by lim in the presence of the jury, notwithsteading plaintiff's repeated objections, to inject into the case the torkmen's Compensation act, with the obvious purpose of the creating in the minds of the jurors the impression that Jobean's only recourse was under that act and that he had olready been inlly compensated for his injuries.

A clearer understonning of what sormally occurred during the cross-examination of Butler by nouncel tor shereceivers is afforded by the following:

"Q. Now long was Mr. Cobean away from his place of Laplay-ment following this socident, Mr. Butler?
A. Well, some weeks. Or course, I have beard the testi-

mony and what he said, and I would say : bout three months.

U. And his calary was paid by the saller lager Dempery all the time that he was away from his employment as the result withis accident, was it not?

A. Yes. Yes.

Q. Mr. Butler, you say that Mr. Cobean ind charge of salen in Chicago for his company, is that correct, be had saler that that correct, be had sales, did you?

. Jon bib I . M . A

Q. Will you please tell us again what fork he did?
A. I said he was managing vice provident of the J. . Lutler
Company, Chicago division. They have several cavision..

Q. Chicago division?

A. Chicago division.

is that right? A. He was the supreme authority under the president and its board of directors. Q. He was going out there to see some salesmen? No. A. I thought you said that he was going out there to meet some salesmen and a printer? A. No, I didn't say that. Q. Was he going to meet any salesmen out there? A. He was going out to meet one of our salesmen and a printer. Not salesmen, not salesmen. You put it in the plural.

Not salesmen. A salesman?

A. One of our own salesmen and a printer.

Q. And was that salesman in his division?

A. Yes.

And was the printer a customer of the firm?

A. Now, just a minute. You asked if the salesman was his division. I think that salesman was a salesman who worked --

Mr. Walker: If the Court please, I don't see the materiality I must object to it.

Mr. Robinson: We will find out. Mr. Walker: I don't see the materiality of it. I must object to it.

The Court: He may answer.

The Witness: What did you object to, Mr. Walker? Mr. Walker: The Court has overruled me. He thinks you

can answer. The Court: Q. Do you have in mind the question?

A. Yes, if that salesman was a salesman of that division. The Court: Q. If you know, tell us?

Now that you are asking me in that particular fashion, he was a salesman I believe of the Chicago division. I don't mean the Chicago division but the Butler Paper Corporation, which cooperates with the sales department of the Chicago division.

Mr. Robinson: Q. Then he was a man under Mr. Cobean, is that

correct?

No. No. No.

One of the men who does business with Mr. Cobean?

A. Yes.

Q. All right. Now, the printer that you speak of that you were going out to see, was he a customer of the firm?

A. Yes. Mr. Walker: I suppose I could have my objection stand to all of this, your Honor. I don't see the materiality of it in this case.

The Court: He may answer that.

Mr. Walker: I don't want to object all the time. It may be considered as a general objection?

The Court: You had better do so.

Mr. Robinson: Q. Was he going out to promote the business of the Butler Paper Company in any way?

Mr. Walker: I object to that. The Court: He may answer that.

A. I certainly hope so.

Mr. Robinson: Q. It was one of the purposes of having the golf game, is that correct?

Not necessarily. A.

Q. Well, was it one of the purposes?

Yes.

And you were also going out to play golf and to - -

Add dignity to the party."

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i chought you said that as was doing out there to Profine a har membeles smes fush

No, I didn't say that. We he mains to make any releases out there's 10

He was caing out to made one our selement care a printer. Not solemen, not a le men. Tou put is in du lural.

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ome of our own salesment and a pa ates. 10

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Now, just a minute. You waked if the calerman was his division. I think that solumnam with a sale and think I .

Mr. walker: If the Court places, I can't not the enterial by . ti of testion tum I

ist. Dollnson: e vill ind out.

Mr. Laiker: I den't see the matril lity of it. I runt object to it.

The Court: He may aminer.

The itness: hat did you of job to, in alker? Mr. The Court has everalled me. I'm taker ou . TOWARS MED

The dourt: Q. Lo you have in mine the greetient

A. Tess i. . Tolutvir Jan. Te manasir a aga mamasira tent The Court . If you ine , til us?

A. Now that you are acking at in that pattionles lashion, he was a selemmen I believe of the Jair jour visien. I with mean the Unices division but the Butler Paper Corporation, which cooperate

with the sales copartness of the this we divi ion. Mr. Rooinson: 4. Then he car a man and at delega, is that

correct?

No. No. No. . 1/2

One of the men who does butiness that Mr. out n? Yes.

All right. Now, the printer that you he . (tirt .0

you were going out to uce, we he a naviants of the limit

Yes. . A

Mr. Welliam: I cuppere a coult inverse ell of tide, your loner. I den't see the meter list or it in

The Court: He may answer that.

Mr. Malker: I don't and to co ot the i the. It amp le considered as a general objection? The Court: You had better to so.

Mr. Lobinson: V. on Le poir, ou te pranote the busines of the Butler Paper Company in my way?

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was it one of the purposes. 4 3) Yes. . A.

And you were also wing out to play out no co -0 30

Add dignity to the garty."

At the conclusion of Butler's cross-examination by attorney Walker for plaintiff, which was confined exclusively to matters concerning the collision, with the exception of the witness's statement that he was on the way, at the time and place in question. to play golf with Cobean and the others for "my pleasure," the following took place on the recross-examination of Butler by Mr. Robinson, representing the receivers:

The J. W. Butler Faper Company, is that the company

for which Mr. Cobean was working?

He was working for one of the divisions of the J. W. Butler Paper Company. The J. .. Butler Paper Company is a holding company.

Well, what company was he working for?

A. Chicago division.

Q. What is the corporate title of it?

A. J. W. Butler Paper Company.

J. W. Butler Paper Company. Now, the J. W. Butler Paper Q. Company, did they manufacture paper?

A. No.

Mr. Brown: Just a minute. That is objected to, if the Court please, as immaterial, irrelevant --Mr. Walker: I made the same objection yesterday, your Honor.

Mr. Robinson: Q. Did they store paper?

Mr. Walker: Of course, I appreciate what Counsel is trying to prove here. It is entirely incompetent.

Mr. Robinson: No, it is not incompetent.

The Court: He is interested in what they are doing because you tried to prove some connection with them.

Mr. Robinson: This gentleman, Mr. Cobean, was working for

that company.

The Court: All right.

Mr. Robinson: Q. Now, I want - you say you left 223 Monroe street, is that correct?

A. What is that?

What was the number of the place of business that you Q. left that morning in your automobile?

A. 223 to 225 East Monroe.

Is the Butler Company - that is their place of business as far as Monroe street is concerned, is that correct?

Yes. A

Q. Do they store paper there?

Yes.

Mr. Walker: That is objected to. Just a minute. I move to strike.

The Court: I don't see how it is material.

Mr. Walker: I suppose they think this man was an employee.

They don't pay my bills, though. The Witness:

Mr. Walker: I suppose they think he was under the Compensation It is entirely incompetent, your Honor. There is no plea. act.

Mr. Robinson: There doesn't have to be any plea. It is

raised under the general issue. Mr. Walker: Very well.

Mr. Robinson: The fact that this man at the time of the occurrence was working for the J. W. Butler Paper Company, and as

At the conclusion of Butler's crownending in molaulance out the wolf or o' gleviaulone bonlines we which this for rol reales concerning the collision, with the exception of the either 'cottement that he was on the wry, ot the time uniglace in quating, replay golf with Cobean and the others you may pleasure," the relieving took place on the recross-examination of Fuller by Mr. Foringon, representing the receivers: ynegrape of the it is appropriate our configuration of the company for which Ar. Cobean was working? A. He was working for one of the livitions of the J. . Eutler Lager Company. The J. . Butler saper company is a helding company. ell, what company we he action orf Chicago Civision. 4 A What is the corporate title of it? 431 J. .. Butler Paper Company. rousi tollant . MC: , tato J. J. Dutlin Tegal willing . . . T 1 Company, did they manufacture paper? . OTE 1 h Mr. Brown: Just a minute. That is objected to, if she Court please, as immeterial, irrelevant --Mr. Walker: I made the same objection yesterday, your . TOMOH Mr. Robinson: Q. . sid they store payst? Mr. Walker: Of course, I apprenie to that Coursel is trying to prove here. It is entirely incompotent. Mr. Robinson: No, it is not incemisfoff . Th The Courts she is interested in that they ear coins because you tried to prove some a smeet on with them. Mr. Robinson: This gentleman, in Cobern, is collin for that company. The Court: All right. Mr. Robinson: Q. Mars I test - con the group of the second in that correct? What is that? s A .0 What was the number of she plans or localine for the left that morning in your sutemo the? 223 to 225 Hast Fouroe. · A Is the Butler Company - that is their place of business as far as Monroe street is cone and, is the teers of . aoY 160 No they store paper there?

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Yes.

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Mr. alker: Very well.
Mr. Recinson: The fact that this nam at the time of the occurrence was working for the J. Lutler Septr Cappiny, and as

counsel has pointed out, he came under the Compensation act.

Mr. Walker: It isn't cross-examination at all, your Honor.

It is incompetent.

Mr. Robinson: Brought out on direct.

Mr. Walker: No, it wasn't. He didn't put him on the stand.

Mr. Brown asked him nothing about it at all.

Mr. Brown: Yes, I did ask him about it.

Mr. Walker: He wasn't under, but I don't Mr. Walker: He wasn't under, but I don't want to take an hour to prove it here, your Honor. I object to it.

The Court: All right, we will inquire about it now.

Mr. Robinson: Q. Were there elevators in that building?

Mr. Walker: The same objection.

The Court: He may answer.

Mr. Walker: I don't want to object all the time.

The Court: All right.

What kind of elevators? A.

Mr. Robinson: A. And how many stories high?

What kind of elevators? A.

Q. Any kind. Were there freight elevators and passenger elevators?

> A. Yes, and merchandise elevators.

Q. And paper was stored there, is that right?

A. Yes.

Q. Was there any machinery for cutting paper there?

A. Yes.

Was that run by electricity, motors? Q.

A. Yes.

Q. And the cutting is done with some kind of a knife, or blade, is that correct, of machinery?

Tes. A.

Mr. Walker: I move to strike all testimony out relating to the Butler Paper Company having some elevators in their building and it happens to be a warehouse over there. I move to strike it all out, your Honor. It is utterly incompetent.

Mr. Robinson: Of course it isn't incompetent. It shows

the relation --

Mr. Walker: And also not cross-examination here.

Mr. Robinson: The business he was engaged in, his employer was engaged in.

Mr. Walker: He is going to make a game of golf employment, I suppose.

The Court: He is not suing an employer.

Mr. Robinson: What?

The Court: He is not suing an employer.

Judge, here is the purpose. There is evidence Mr. Robinson: here now that they were going out to play golf with a customer of the Butler Paper Company. Now, if this accident arose in the course of his employment, that company is liable under the Compensation Act and no common law suit can apply.

Mr. Walker: Where is there any evidence here he was going

out for business.

Mr. Robinson: You heard that from Mr. Butler himself. Mr. Brown: And from Mr. Cobean, also.

Mr. Robinson: Section 29. We will discuss that later."

There was not even the slightest implication in this case that the golf game in which plaintiff invited Butler and the others to participate at his expense and which he and Butler were on their way to play when the collision occurred was for any purpose other

ocunsel has pointed out, he came under the Compensation act all, your long.

It is incomposent.

Mr. Hobinson: Brought out on direct.

Mr. "slker: No, it wasn't. He didn't put like on the thent. Mr. Brown acked him nothin, shout it st sali.
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. A ind how many storice histor * 2 Hobinson: - 79

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Yes, and morchandise elevators.

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and the car bas rolland beliant Titatela holden at each the each to participate at his expense and which he and Duller were on their way to play when the collision occurred was you any purpose other than recreation and pleasure until Butler's cross-examination by counsel for the receivers. After stating on this cross-examination that, while one of the purposes of the golf game was not necessarily to promote the business of the Butler Paper Company, he certainly hoped it would do so, and that one of the reasons for his acceptance of Cobean's invitation to play was to "add dignity to the party" and on cross-examination by plaintiff's counsel that he was going to play golf that day for "my pleasure," Butler finally answered "yes" to a question as to whether one of the purposes of the golf game was to promote the business of the company of which plaintiff was an officer. This was merely his conclusion and certainly did not even tend to show that such was plaintiff's purpose or that plaintiff was engaged in his company's affairs, either as an executive or an employee, at the time and place of his injury.

If one of the purposes of the golf game was to promote the business of plaintiff's employer through the social contacts incident thereto, even then the injuries sustained by Cobean surely could not be held to have arisen out of and in the course of his employment, and even if it could be held that his injuries did arise out of and in the course of his employment, still the relation of plaintiff to the Butler Paper Company and the accident in question would not come under the Workmen's Compensation act.

In Ryan v. State Auto Parts Corp., 255 Ill. App. 422, where plaintiff was an executive officer of a company which was automatically under the Workmen's Compensation act by reason of the character of its business and he was injured in the performance of certain duties for his company on the premises of the defendant in that action, in passing upon plaintiff's status as to whether he was entitled to prosecute his claim at common law, this court held at pp. 424-25-26-27:

"Defendant quotes section 5 of the Workmen's Compensation Act of 1925, Cahill's St., ch. 48, par. 205, defining the term 'employee' as 'every person in the service of another under any than recreation and pleasure until Butler's cross-examination by counsel for the receivers. Ifter stating on this cross-examination that, while end of the purposes of the colf game was not necessarily to promote the business of the Butler Paper Gempany, he certainly hoped it would do so, and that one of the reasons for his acceptance of Cobesn's invitation to play was to "add dimity to the party" and on cross-examination by plaintiff's counsel that he was going to play golf that day for "my pleasure," Butler finally unswered "yest to a quastion as to whether one of the purposes of the tolf game to a quastion as to whether one of the purposes of the tolf game an officer. This was merely his company of which plaintiff was engaged in his campany's affairs, either as an executive or an employee, at the time and place of his injury.

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contract of hire, express or implied, oral or written, etc. It is argued that this comprehends the plaintiff, who was under a contract of hire with the Motor Transportation Company and therefore plaintiff comes within the act.

"We are not disposed to agree with this contention. Workmen's Compensaction Act contemplates the relation of master or employer, on the one hand, and servant or employee on the other. One who is an officer of a corporation, while acting as such, represents the corporation and his acts are the acts of the corporation. He makes the contracts of employment of the corporation with the employees, and it would be an obvious misnomer to call him an employee while so acting for the corporation. In Harper's Workmen's Compensation Act (2nd ed.), page 202, section 106, it is said: 'The law with reference to workmen's compensation contemplates two persons standing in the opposing relations of master and servant, employer and employee, plaintiff and defendant, or a person entitled to judgment or an award in his favor against another person obligated to pay it. does not contemplate the anomaly of one person occupying this dual relation and paying himself for injuries received, with the funds in which he has a joint interest. It is therefore generally held that executive officers of private corporations and members of partnerships are not entitled to compensation for injuries sustained in connection with the industry carried on by them, because a person cannot be at one and the same time employer and employee.

** * *

"From a consideration of these and many other decided cases we hold that in the instant case plaintiff, while investigating trucks which defendant was offering for sale with a view of purchasing the same on behalf of the Motor Transportation Company, was acting in his official capacity as the executive manager of his company, and that while injured in performing this duty he was not doing the work of an employee and hence would not come under the Workmen's Compensation Act."

In Stevens v. Industrial Commission, 346 Ill. 495, in approving the conclusion reached by this court in the Ryan case, supra, our Supreme Court said at pp. 499-500-501:

"The defendants in error base their defense on the proposition that Stevens was engaged in an official capacity at the time he was injured and that the relation of employer and employee did not exist between him and the Dolan Company, and it is said that he was several blocks away from the plant for the purpose of collecting a bill - a function which had nothing to do with the manual or mechanical part of the plant but was peculiarly and exclusively a part of his official duties as secretary and treasurer of the corporation. The question is not, however, whether the duty he was performing was mechanical or manual in its nature but whether it was an official duty imposed upon him by the nature of his office as secretary and treasurer. We have already seen that the act applies to all the employees of a corporation, regardless of the nature of their duties or the character of the work in which they were engaged. Whether it applies to the general executive officers of a corporation has never been decided or considered by this court. It was considered by the Appellate Court for the First District

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in Ryan v. State Auto Parts Corp., 255 Ill. App. 422, which was an action for personal injuries received by the plaintiff through the negligence of the defendant. The defense relied upon by the defendant was that the plaintiff was in the employ of the Motor Transportation Company, and that the plaintiff, his employer and the defendant were all operating under the Workmen's Compensation act, and that under section 29 of the act the action at law by the plaintiff could not be maintained. The business of the Motor Transportation Company was hauling material by truck, and it used between sixty and sixty-five trucks in the conduct of its business. The plaintiff had been connected with the company about fifteen years, was a stockholder and also its superintendent, secretary and purchasing agent. He hired all its employees, bought all the necessary motor parts, made charges for services, entered them on the books of the company and checked all bills. The book-keeps The book-keeper made out and signed all checks and the plaintiff checked them, and, if correct, countersigned them. He received a monthly salary paid by checks countersigned by himself. He signed contracts of the corporation, as the president also did. He did not drive any of the trucks but was the executive officer of the company. He was injured by falling down an open elevator shaft on the defendant's premises negligently left unguarded. He had gone to the defendant's premises to examine some secondhand motor trucks which he had learned that the defendant had for sale, with a view to the purchase of them for his company. The Appellate Court held that in doing this the plaintiff was acting in his official capacity as the executive manager of his company and was not doing the work of an employee and therefore was not under the Workmen's Compensation act. We regard this decision as giving a proper construction to the Workmen's Compensation act in accordance with the weight of judicial authority.

* * *

"The language of our Workmen's Compensation act is more comprehensive than that of the New York act and has been given a broader construction, since we have held in the cases which have been cited that it includes all employees of an employer conducting any of the various forms of extra-hazardous business mentioned in the statute, regardless of the character of their duties. We have not, however, obliterated the distinction between the higher executive officers and its workmen."

Assuming that the sole purpose of the golf game to which Butler was driving Cobean at the time of the collision was to promote the business of the Butler Paper Company, that fact could not bring plaintiff under the Workmen's Compensation act because he would then be acting in his official capacity as the managing executive of this company and not doing the work of an employee.

There are numerous authorities such as the <u>Stevens</u> case, <u>supra</u>, which hold that if an executive officer of a corporation receives injuries while doing work outside his duties as such officer, such as performing service or doing the work of an ordinary employee,

in Tyen v. State wto jerte dono., 155 ill. vol. St., with was an action for personal injuries state by the plainus of ought the negligence of the defendent. The defence relies upon by the defendent wer til time pi invit. Jar the the there of the Jorgan and Transportation Company, and that the plainting life conference and the desandent serve all operating unitable orders. Torrent contact, and the contact of the section of the section of the section of the section of the plaintiff and and action reducing the plaintiff and action of the factoristic of the first portain of the handing section by truck, and is need from the handing section by truck, and is need between chary and sluty-live tracks in the tennested of its includes. The plaintiff had been counciled the highest particular and the highest was a sendilleles with live it was passed as sendilleles with live it was presented. and purchasing agent. He his o all its aglegree, beauth all the necessary motor parts, made direct for privious, orters a Shem on the books of the dengeny and checked will mills. The lock-hesper made out and signed this shock the protect is six exect them, and, if correct, countered them. He restived a manual, waltary paid by checks count raigned by him alf. Fe chemic ornings to of the corporation, as the president whee tide He dil now a ave any of the trucks but mustine encountry, officer of the communy. He was injured by falling down on open of w tor shelf on the classical and not premises negligently follows under the had gone to ske action to premises to exemine sens according no cuesa sense animote led led learned that the dafferd at had you sale, with a value to the jurchase of them for his company. The Apprilate Court is 1. Let in come this the plaintin was seting in his official copacity as the ex outive maranger of his company are not one middle the control of the employee and therefore was not under the soriar n's Songana tion act. We regard this desicion as giving a grover con arrition to the original's Compensation and in appropriate the the maight of juriciel . Wilionitus

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"The language of our collect's Compensation act is note comprehensive than thet of the New York set and has been given a broader construction, since we have hald in the cares which have been cited that it includes all employees of an employer contacting any of the various forms of extra-hazardous insiness untioned in the statute, regratless of the churcter of that duties, we have not, however, oblitanted the distinction between the higher executive officers and its vorkers."

Assuming that the scle purpower of the collidation and to promote functions was driving Cobean at the time of the collidation and to promote the business of the lutter raper Company, that fact could not bring plaintiff under the orimen's Company tion act bre act no call then be acting in his official departry as the acting in his official departry as the acting in accountive

There are numerous authorities and to the object case, events, which held that if an executive extince of a comportion recolves injuries while doing work outside his duties as auch experiently service or coin, the work of an oreinary suplayee,

he comes under the compensation act. Nothing appears in the facts here that suggests that plaintiff might come within that classification. Plaintiff and Butler were on their way to play a golf game that could not in legal contemplation have had anything to do with plaintiff's employment either as an executive officer or an employee, and it is inconceivable to us how, under any theory, either his relationship to his employer or his situation at the time of the occurrence could possibly come within the purview of the compensation act.

It is true that after injecting the compensation feature into the case it was abandoned as a possible defense. Nevertheless the evidence on that subject and counsel's prejudicial remarks in connection therewith in the presence of the jury remained in the record and nothing was done either by counsel for the defendants or by the court to dispel from the minds of the jury the erroneous impression that may have been created thereby.

If we assume that Butler and plaintiff were engaged in a joint venture at the time of the collision to promote the "Butler paper business," then the motor trip was a business one, plaintiff was not a guest within the meaning of the Quest act (Foale v. Linsky, 279 Ill. App. 58) and it would not be necessary for him to prove willful and wanton conduct on Butler's part in order to recover from him.

Although plaintiff objected both to the entire line of inquiry and to the specific questions which sought to show the applicability of the compensation act and moved to strike the testimony bearing upon that subject, the receivers now urge that plaintiff's objections, motions to strike and motion for a new trial were not sufficiently specific. With this we are unable to agree.

The receivers then claim that they were entitled to develop and make any legitimate defense which the evidence might disclose and that they were entitled to inquire into the specific duties of he comes under the compensation act. Methins appears in the facts here that suggests that plaintiff might come within that classification flaintiff and Butler were on their way to play a solf game that could not in legal contemplation have had anything to do with plaintiff amployment either as an executive officer or so employer, and it is inconceivable to us how, under any throng, either his relationship to his employer or his situation at the time of the occurr noe could possibly come within the purview of the compensation set.

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plaintiff and the hazardous nature of the Butler Paper Company's business "for the purpose of showing, if they could, that he was within the provisions of the Workmen's Compensation act." This contention is without merit. Under the authorities above cited the subject matter of the line of inquiry heretofore set forth did not constitute a legitimate defense in this cause. But even more prejudicial than the inquiry were counsel's statements made in the presence of the jury, supposedly predicated upon the answers elicited from Butler during the course of his cross-examination. Mr. Robinson's statements that "the fact that this man was working for the J. W. Butler Paper Company he came under the Compensation act" and "now if this accident arose in the course of his employment that company is liable under the Compensation act and no common lawsuit can apply," coupled with the fact that it was instilled into the minds of the jury that Cobean had been paid his full salary while incapacited and that Butler had in the first instance paid his hospital and doctor bills, might well have led the jury to believe and find that plaintiff was entitled only to compensation, and that having been paid his salary and having had his doctor and hospital bills paid by Butler he had already received all that the Compensation act or the law allowed.

The defendant Butler's counsel, Mr. Brown, aided in the endeavor to impress the jury with the alleged applicability of the compensation act to plaintiff's claim. At one point in his cross-examination by Mr. Robinson, Butler was asked if his company stored paper in its Monroe street plant and he answered "yes". Plaintiff objected to the question and moved to strike the answer. A colleguy between counsel ensued, during which Mr. Robinson made the statement in the presence of the jury, heretofore referred to, "he came under the Compensation act." When plaintiff's counsel persisted in his objection that the subject matter was incompetent and not cross-

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examination, Butler's attorney insisted "I did ask him about it," although the character of plaintiff's employer's business was not referred to on the direct examination of the witness. Again, when the motion of counsel for plaintiff "to strike all testimony out relating to the Butler Paper Company having some elevators in their building and it happens to have a warehouse over there, " was followed by colloquy between counsel, culminating in Mr. Robinson's statement that "if this accident arose in the matter of his employment that company is liable under the Compensation act and no common lawsuit can apply," and Mr. Robinson then stated that Butler testified that Cobean was "going out for business," Butler's attorney added in the presence of the jury that Cobean himself, testified that he was "going out for business," which was untrue. On both of these occasions the conduct of counsel for Butler materially assisted Mr. Rebinson in misleading the trial court with his then contention that Cobean could legally seek redress only for his injuries under the Compensation act.

court in its rulings upon the evidence, in order to exclude from the hearing of the jury irrelevant and improper testimony calculated to injuriously affect their minds and judgment in arriving at a verdict. (C. & E. I. R. R. v. Dunworth, 203 III. 192; Chicago Union Traction Co. v. Arnold, 131 III. App. 599.) The cross-examination of Butler and the prejudicial statements made in the presence of the jury by the experienced, astute counsel for defendants could, in our opinion, have been calculated only to mislead the jury and divert their minds from the real issues involved.

While no objection was interposed to the closing argument of either counsel for defendants, it is pertinent to observe that Mr.

Robinson's argument contained a subtle reference to the "business purpose" of Cobean's ride in Butler's automobile, which could have served

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Care and exactness was the impersite duty of the trial court in its rulings upon the evidence, in order to exclude from the hearing of the jury irrelevant and improper testimony salculated to injuriously affect their minds and jurgment in triiving the verdict. (0. & H. I. R. R. v. Junwerth, 003 III. 1944 Chicago Union Traction Co. v. Arnold, 131 III. (pp. 595.) The execution time prejudicial statements made in the presence of the jury by the experienced, satute counsel for defendants sould, in our opinion, have been calculated only to mislead the jury and divert their minds from the real issues involved.

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only to refresh the minds of the jury as to the highly improper evidence and statements of counsel concerning the Compensation act.

Mr. Brown's argument was replete with statements that had no bearing on the issues involved and many portions of it merely appealed to the prejudice and passion of the jury.

There is nothing about this case which even under the most exaggerated theory could be twisted so as to show any relation between plaintiff's claim and the Workmen's Compensation act, and we can perceive of no other reason for injecting that act into the case than to prejudice the minds of the jury against plaintiff. Having done so, it is fatal error necessitating the depriving of defendants of the fruit thereof. (Union Traction v. Lauth, 216 III.

176; Chicago Union Traction v. Arnold, supra.)

In our opinion the ends of justice will be best served by a retrial of this case inasmuch as plaintiff has not had that fair and impartial trial which the law guarantees in the protection of the rights of litigants.

As this case will in all likelihood be retried, we refrain from discussing the evidence as to the collision. A careful examination of the instructions convinces us that many of them to which objection is raised by plaintiff were improperly drawn and did not correctly state the law applicable to the issues involved, but we deem it unnecessary to discuss them, feeling that if and when the case is again tried such errors as are contained in the instructions will be eliminated.

A motion, which was reserved to hearing, was heretofore filed April 29, 1935, to strike from the transcript of the record herein the report of proceedings at the trial and to dismiss this appeal. This action was tried in the Superior court before the late Judge R. M. Mangan of the city court of Aurora and Judgment entered therein June 30, 1934. Plaintiff was granted sixty days

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within which to file the report of proceedings at the trial. Within such sixty days, upon stipulation of the parties, an order was entered August 22, 1934, by the only judge of the Superior court then helding court, extending the time for the filing and approval of the report of the proceedings to September 29, 1934. September 20, 1934, the report was presented to Judge Mangan and he then certified that it was presented on that date for approval. September 26, 1934, Judge Mangan entered an order upon stipulation of the parties extending the time for the filing of the report to October 20, 1934. The following order was entered by Judge Mangan October 17, 1934: "On motion of defendants receivers of the Chicago Surface Lines, leave is given said defendants to file objections herein on or before October 31, 1934, to the report of the proceedings at the trial heretofore presented to the court by the plaintiff within the time provided by law, and hearing on said objections is continued until the further order of the court herein." January 22, 1935, Judge Kelly continued to January 25, 1935, plaintiff's motion to approve the report of proceedings which had theretofore been presented to Judge Mangan, the trial judge, for approval September 20, 1934. January 25, 1935, plaintiff filed a petition in support of his motion of January 22, 1935, which recited, substantially, the facts heretofore set forth as to the report of proceedings and in addition thereto that Judge Mangan was sick during the months of October to December, and died December 24, 1934; that plaintiff had requested the trial judge on several occasions to hear the pending objections and settle the report; and that December 3, 1934, plaintiff's attorney received the following communications from the trial judge:

"December 1, 1934.

City Court of Aurora, Edward M. Mangan, Judge. Mr. Earl J. Walker.

Dear Sirt

I received your letter of November 30, concerning the

within which to file the report of proceedings at the trial, ithin such sixty days, upon attpulation of the parties, an order was entered August 22, 1934, by the only judge of the Enverior court face nolding court, extending the time for the filing and appropriate of the report of the proceedings to Sentember 29, 1954. September 20, 1934, the report was pres nied to Judge Margan and he then dertified that it was presented on that date for suproval. Saptember 26, 1934, Judge Mangan entered an order upon stimultion of the parties extending the time for the filling of the report to October The following order was entered by Judge Evangen Satober 20, TESA. 17, 1934: "On motion of defendents receivers of the chice o urrece Lines, leave is given said defendants to file eljections herein on or before October 31, 1934, to the report of the proceedings at the trial heretofore presented to the court by the plaintiff within the time provided by law, and hearing on said objections is acntiqued until the further order of the court herein. Housey 22, 1935, Judge Helly continued to January 25, 1935, plaintiff's motion to approve the report of proceedings which had theretofore been presented to Judge Mangan, the trial judge, for approved teptember 20, 1934. sensery 25, 1935, plaintill filed a petition in support of of January 22, 1935, which recited, substantially, the facts heretofore set forth as to the report of proceedings and in adultion therete that Judge Mangan was sick during the menths of October to and died December 24, 1934; that plaintiff had requested the trial subsect a several occasions to hear the pending objections and estite the report; and that December 3, 1834, plaintiff a re orm y received the following communications from the trial judge:

"December 1, 1934.

City Court of Aurora, Edward M. Mangan, Judge. Mr. Marl J. Valker.

Dear Sir:

bill of exceptions in the <u>Cobean v. Chicago Surface Lines</u> which will need approval. I have been ill in bed for the last two weeks and expect to be able to get around in a week or so. When I am able to get to Chicago I will ommunicate with you and we can arrange to meet.

Yours very truly, E. M. Mangan.

The petition prayed that one of the judges of the Superior court hear and dispose of the objections and approve the report of proceedings presented September 20, 1934, and that an order be entered to file same nunc pro tune as of September 20, 1934.

Defendants insist that since the report of proceedings was not filed in the trial court on or before October 20, 1934, the last date for filing same specified in the order of September 26, 1934, entered during the last extended period, the motion to strike the report of proceedings and to dismiss the appeal should be allowed.

It will be noted that when plaintiff presented the report of proceedings for approval September 20, 1934, he did so within apt time. It was not approved and filed because of objections interposed by defendants. The then period for the filing and approval of the report expired September 29, 1934. To allow further examination of the report as presented, the parties stipulated to the entry of the order of September 26, 1934, extending the time for its approval and filing to and including October 20, 1934. October 17, 1934, on the receivers' motion, they were allowed until October 31, 1934, to file formal objections to the report, and the hearing on same was continued until the further order of the court. Judge Mangan's fatal illness intervened and the objections were not disposed of until after his death.

The report of proceedings was presented to the trial judge within the limits of an extended period for filing same and the rule is that, if a report of proceedings is presented to the trial judge at such time that it can be filed within the time provided by order of the court, the party will not be prejudiced by the neglect or

bill of exceptions in the Cobesn v. Chicago .urface hines which will need approval. I have been ill in bed for the last two weeks and expect to be able to get around in a week or so, hen I am able to get to chicago I will communicate with you and we can arrange to meet.

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The report of proceedings was presented to the trial judge within the limits of an extended period for filling same and the fall is that, if a report of proceedings is presented to the trial judge at such time that it can be filed within the time provided by ender of the court, the party will not be prejudiced by the neglect or

delay of the judge to sign the report until after the time fixed for that purpose has expired. (Hall v. Royal Neighbors, 231 III.

185; Underwood v. Hossack, 40 id. 98; Hill Company v. U. S.

Guaranty Company, 250 id. 242; Ebinden v. DeMoulin, 328 id. 156.)

If the date of presentation of the report of proceedings appears on same an order may be made whenever it is afterward approved and signed to file it nume pro tune as of the date of such presentation to the trial judge. (Hawes v. People, 129 III. 123; Ferris v.

Commercial Nat. Bank of Chicago, 158 id. 237; Hall v. Royal

Neighbors, supra.

We find nothing in the provisions of the present practice act or rules of this court or the Supreme court that supercedes or contravenes the rules of law above set forth.

Subsec. C of sec. 1 of rule 36 of the Rules of Practice and
Procedure of our Supreme court provides: "The report of the proceedings at the trial consisting of the testimony and the rulings
of the trial judge and all matters upon which such rulings were made,
and other proceedings which the appellant desires to incorporate in
the record on appeal, shall be procured by the appellant and submitted
to the trial judge or his successor in office for his certificate of
correctness, or where this is impossible because of the absence from
the district, sickness or other disability of such judge, then to any
other judge of said court, and filed in the trial court within 60
days after the appeal had been perfected." Subsec. C of sec. 1 of
rule 1 of the rules or practice of this court contain a similar
provision.

The record shows affirmatively that plaintiff had used due diligence to have the report of the proceedings approved, not only after but before the death of the trial judge; and that, although such report had been submitted to the trial judge within apt time, September 20, 1934, and had been certified by him as having been

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Subsec. C of sec. 1 of rule 36 of the Rules of Fractice and recordure of our Supreme court provides: "The report of the proceedings at the trial consisting of the twisting and the rulings of the trial judge and all matters up an which anch rulings are made, and other proceedings which the appellant desires to incompose in the record on appeal, shall be produced by the appellant and submitted to the trial judge or his successor in office for his certificate of correctness, or where this is impossible because of the absence from the district, sickness or other disability of such judge, then to any other judge of said court, and filed in the trial court within to days after the appeal had been perfected." Submed. 2 of sec. 1 of rule 1 of the rules or practice of this court contain a similar

The record shows affirmatively that plaintiff had used ine diligence to have the report of the proceedings opposed, not enly after but before the death of the trial judge; and that, although such report had been submitted to the total judge within apt time, such report had been submitted to the total judge within apt time, september 20, 1934, and had been certified by him as having been

presented for his approval on that date, it was not approved by Judge Mangan by reason of his sickness and death. The order signed by Judge Kelly certifying that the report of proceedings was full, true and correct, complied strictly with the rule of court above set forth, which prescribed the circumstances under which a judge of the same court, other than the trial judge, may approve a report of the trial proceedings. Judge Kelly not only had authority but it was his duty to approve the report nunc protunc as of September 20, 1934, the date of its presentation to the trial judge.

The motion to strike the report of proceedings and to dismiss the appeal is therefore denied at this time.

For the reasons indicated herein the judgment of the Superior court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

Friend and Scanlan, JJ., concur.

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ARVENDED AND AUMANDED FOR A FIRST TRAIL.

Friend and Scanlam, JJ., conduct.

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RUSSELL FIREBAUGH, as trustee, E. RAY GRANT, as successor-trustee, and JOHN R. O'CONNOR, as second successor-trustee,

Appellees,

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ARTHUR F. JOHNSON et al., (defendants).

On appeal of HELGE ERICKSON,
Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

287 I.A. 618²

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

June 15, 1928, Arthur F. Johnson and his wife and Delbert D. Ehresman and his wife, defendants in this cause, executed and delivered first mortgage bonds aggregating \$98.500 and a trust deed to certain premises known as the Faylor apartments to secure payment of same. Thereafter Helge Erickson secured a judgment against the said defendants for \$7,100.21 and sought to enforce payment of same by filing a creditor's bill and having a receiver appointed for the property involved in this proceeding. Default having occurred in the payment of taxes and interest on the bonds, the trustee, Russell Firebaugh, elected under the terms of the trust deed to declare the entire mortgage indebtedness due and payable. The trustee thereupon filed a bill January 15, 1930, to foreclose the mortgage in behalf of all the bondholders, and the receivership of the property under the creditor's bill was extended to the foreclosure proceeding. A decree of foreclosure and sale was entered December 23, 1930, in which it was found inter alia that Helge Erickson, who was made a party defendent in this cause,

RUSCELL FIREDAUGE, as trustee, E. M.Y GRANT, as successor-trustee, and JOHN R. D'CONNON, as second successor-trustee, .ppcllees,

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ANTHUR F. JOHNSCH et al., (defendents).

On appeal of H-LGE MEICKEOM, Appeallent.

ARTES A ROW OURSELOR

MR. PRESIDING JUSTICE SULLIVAN DELLVENID THE OFFICE OF THA COURT.

June 15, 1928, Arthur F. Johnson and his wife and Delbert D. Ehresman and his wife, defendants in this cause, sace wife, delivered first mortgage bonds aggregating \$98,500 and a trust deed to certain premises known as the Faylor apartments to secure thengol a seme. Thereafter Helge Erickson secured a judgment estalne of the west bus 12.001,70 tol attached by biss ent fantage payment of same by filing a oreditor's bill and having a receiver appointed for the property involved in this proceeding. Lafault having occurred in the payment of taxes and interest on the bonds, the trustee, Bussell Firebungh, elected under the torms of the trust deed to declare the entire mertgage indebtedness due and payable. The trustee thereupon filed a bill Jenuary 15, 1930, so foreclose the mortgage in behalf of all the bondholders, and the receivership of the property under the cruditor's bill was extended to the foreclosure proceeding. A decree of foreclosure and sale was entered December 25, 1950, in which it was found inter alia that Helge Wrickson, who was made a party defendent in this cause,

had a valid subsisting junior lien against the property foreclosed, subject only to the lien of the aforementioned trust deed. The trustee purchased the property at the master's sale and a decree was entered April 8, 1931, approving the sale and for a deficiency. October 10, 1932, Erickson filed a petition to set aside the sale and vacate the decree approving same, followed by numerous supplemental, additional and amended petitions, praying for the same relief. January 17, 1935, the court entered a decree denying the prayer of all Erickson's petitions to set aside the master's sale and the order approving same. It is this decree that Erickson seeks to reverse by this appeal.

The decree of foreclosure under which the sale was held was in the usual form and, after finding that \$107,602.93 was due on the mortgage indebtedness, ordered that the premises involved "be sold by said master in chancery at public auction for cash to the highest bidder" and that the trustee "may bid at any sale of said real estate * * * for the entire amount of said indebtedness * * * and in making settlement with said master in chancery for the amount so bid at said sale, shall be entitled to take credit pro rata in proportion to the amount of said bid for bonds and interest coupons so presented for cancellation in lieu of cash."

The master's report of sale set forth that Firebaugh, as trustee, offered and bid \$93,000, which was the highest and best bid and the property was sold to him for said sum; and that of the amount so bid \$701.25 was paid in cash and the trustee "delivered up for cancellation bonds and coupons aggregating the sum of \$12,436.50, which prorated in accordance with the terms of the decree, entitled complainant to a credit of \$7,716.91," and that "Russell Firebaugh, Trustee, has delivered his receipt for the sum of \$83,733.67."

had a valid subsisting junior lien a sinst the property level of aubject only to the lien of the atoremention of trust food. The trustee parchased the property at the moter's rale of one was entered pril ', 1901, approving the sale and for desiled .). October 10, 1932, Ericken willed a revision in ust acids to . 13 and vacate the degree approving same, follower by americas of planary if, 1855, the court entered a reside the moters and represent of all Brickson's petitions to set acide the moter's sale prayer of all Brickson's petitions to set acide the moter's sale and the order approving same. It is this decree that fateuren

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sum of \$85,733.67."

The defendant Erickson's major contention is that the trustee's failure to pay the amount of his bid in cash or bonds in compliance with the terms of the sale as specified in the decree of foreclosure and sale rendered the sale invalid and that the decree denying his various petitions to set aside such sale and the order approving same was therefore erroneous and improper.

When the chancellor was apprised that Firebaugh as trustee had only paid \$701.25 in cash and delivered only \$12,436.50 in bonds and coupons for cancellation toward the purchase price which he bid at the master's sale, Firebaugh was directed by the court to solicit and secure, if possible, the deposit by the bondholders of sufficient bonds so that the same might be delivered to the master for cancellation toward the purchase price of the property and the sale completed. As a result of Firebaugh's solicitation, a large number of bonds were deposited with him which upon his resignation as trustee January 10, 1933, he turned over to one E. Ray Grant, his successor trustee. Grant as successor trustee continued to solicit the deposit of bonds. Although the period of redemption had long since expired the master refused to deliver his deed of the property to either the trustee or the successor trustee until cash or bonds for cancellation were delivered to him in an amount sufficient to complete the sale.

Grant, the successor trustee, filed a petition November 28, 1934, alleging inter alia "that about January 20, 1933, said Russell Firebaugh turned over to this petitioner a large number of bonds theretofore deposited with him by bondholders for the purpose of applying same on said bid, which said bonds together with other bonds theretofore received by this petitioner from numerous bondholders, and other bonds theretofore deposited with various other persons acting as bondholders committee or independently, were by this petitioner and such other persons deposited with the said William

The defendant Brickson's major contention is that the trustee's failure to pay the smount of his bid in each or bonds in compliance with the terms of the sale as specified in the decree of forealcsure and sale rendered the sale invalid and that the decree denying his various potitions to set aside such sale and the order approving same was therefore erronsous and improper.

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Grant, the successor trustee, filed a petition vaveaber 23, 1934, alleging inter alia "that about January 27, 1937, and knesold Firebaugh turned over to this petitioner a large number of bonds theretofore deposited with him by bondholders for the purpose of applying same on said bid, which said bends together with ether conductore received by this petitioner from numerous bondholders, and other bonds theretofore deposited with verious oil restons acting as bondholders committee or independently, were by this seting as bondholders committee or independently, were by this petitioner and such other persons deposited with the said shillsm

S. Newburger, Master in Chancery as aforesaid, the total amount of bonds so deposited being \$92,600 face value thereof out of a total outstanding of said issue of \$98,500, leaving outstanding and undeposited of said issue bonds to the amount of \$5,900; that said Master estimates and has reported to your petitioner that the pro rata amount due on each of said bonds is 88.9% of the face thereof and that it will require to pay said nondepositing bondholders in cash the sum of \$5,197.31."

The petition alleged also that the successor trustee had made arrangements for a loan of \$12,000, which with the balance of funds in his hands from rents "will be sufficient to pay off said taxes, the money due said [nondepositing] bondholders and the aforesaid expenses and charges" in the event the court directed the master to execute and deliver a deed of the property to him.

The decree appealed from, in addition to denying the several petitions of Eriokson to set aside the sale and vacate the order confirming it, ordered that the resignation of Grant as successor trustee be accepted because of discord between him and persons claiming to be bondholders' committees; that one John R. O'Connor be appointed successor-trustee to Grant; and that the master deliver his deed of the premises to O'Connor, as successor-trustee, Firebaugh having assigned his certificate of purchase to said O'Connor.

Defendant Erickson asserts in his brief that "the decree appealed from directed the master to issue a deed to John R. O'Commor without requiring him or the previous trustees to pay or complete the payment of the purchase price bid at the master's sale" and again that "the \$93,000 bid of Russell Firebaugh still remained unpaid and the terms of sale provided in the decree have never been complied with."

It is insisted in the brief of plaintiff trustee that

S. Howburger, Master in Chancery as aforesaid, the total mount of bonds so deposited being \$92,600 face value thereof out of a total outstanding of said issue of .98,500, leaving outstanding and undeposited of said issue bends to the amount of \$5,900; that zeid Master estimates and has reported to your petitioner that the prorate amount due on each of said bends is 83.9% of the face thereof and that it will require to pay said nemuepositing bendholders in each the sum of \$5,197.31.0

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"bonds and sufficient cash were ultimately deposited with the master to cover said bid of \$93,000."

The record contains no evidence as to whether or not the balance of the purchase price of \$93,000 was fully paid in cash or by bonds delivered to the master for cancellation. Firebaugh paid \$701.25 in cash at the time of the sale and the only other thing in the record bearing upon the matter is the petition of the successortrustee Grant containing the allegation heretofore set forth that \$92,600 of the total outstanding bonds of the issue of \$98,500 were deposited for cancellation with the master to apply on the bid. This allegation was not denied in the defendant Erickson's answer to Grant's petition and is, therefore, admitted as true. In the absence of evidence to the contrary, it will have to be presumed that the court would not have directed the master to issue the deed to the premises to O'Connor, the successor-trustee, unless the purchase price had been completely paid and the terms of the sale as set forth in the decree of foreclosure fully complied with.

What appealable interest has Erickson in the sale that gives him a right to complain? Under the terms of the trust deed the trustee was authorized to bid in behalf of all the bondholders. The amount bid was certainly not inadequate and no fraud is urged or appears in connection with the sale. It is difficult to perceive wherein any right of Erickson was affected by the sale or the manner in which the purchase price was paid. His lien was subordinate to the first mortgage lien of the bondholders. As a judgment creditor he had a right to redeem, which he did not exercise. It was not until long after Erickson's right of redemption had expired that he filed his first petition to set the sale aside.

While the method of making the payment of the purchase price bid at the sale was irregular, we know of no reason why the court in the exercise of its sound discretion was not warranted in following *bonds and sufficient cash were ultimately dejected with the caster to cover said bid of \$93.000."

The record contains no evidence as to whether or not the balance of the purchase price of \$85.0.0 was fully paid in cosh or by bonds delivered to the marker for cancellation. Firebrugh paid \$701.35 in cash at the time of the sale and the enly other thing in the record bearing upon the matter is the petition of the successortrustee Grant containing the callegation here, or ore of forth that trustee Grant conteins the callegation here, or ore successor deposited for concellation with the marter to apply on the bid. This allegation was not denied in the defendant Existent's shewer to drant's petition and is, therefore, admitter as true. In the absunce of evidence to the centrary, it will have to be precumed that the court would not hav directed the master to issue the deed to the premises to "Commor, the successor-trustee, and as the purchase price had been completely paid and the terms of the ...] s act 10.50 price had been completely paid and the terms of the ...] s act 10.50 price had been completely paid and the terms of the ...] s act 10.50 in the decree of forcelocure fully completed with.

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the course it did under all the facts and circumstances of this case. In any event no right or interest of his having been infringed or affected, defendant Erickson has no legal or equitable ground for complaint.

Erickson's other contentions are that the trustee and successor-trustee procured the bondholders to deposit their bonds with them for cancellation by misrepresentation and fraud; and that "the decree appointing John R. O'Connor successor-trustee and ordering the master's deed to issue to said John R. O'Connor as successor-trustee was erroneous and improper for want of necessary parties [bondholders] and for want of any pleading or proceedings to support such appointment or trusteeship."

It is readily apparent that the questions raised by these contentions do not involve any interest of Erickson and that the matters complained of did not injuriously affect any of his rights. If bondholders were making these contentions a different situation might be presented. It was only their rights that were involved when the decree appealed from was entered. It is of interest to note that not a single bondholder, depositing or nondepositing, has objected to the sale, the confirmation thereof, the method and manner of making the payment of the purchase price, or to the decree denying Brickson's various petitions to set aside the sale, appointing O'Commor successor-trustee, and directing the master to execute his deed to the property involved and deliver it to O'Commor as such successor trustee.

We have reserved to hearing plaintiff's motion presented

June 24, 1935, "to strike appellant's record, same not being properly
authenticated by the trial court and also to strike the abstract of
the record as same is not based upon an authenticated record, and
to strike the brief and arguments, same not being based upon an
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We have reserved to hearing plaintiff's matter presented June 24, 1935, "to strike appellant's record, came not being properly authenticated by the trial court and also to strike the obstrict of the record as same is not based upon an authenticated record, and to strike the brief and arguments, same not being based upon an

authenticated record."

While under subsec. 2 of sec. 74, par. 202 of the Practice act (ch. 110, Ill. St. Bar Stats. 1935) "all distinctions between the common law record, the bill of exceptions and certificate of evidence, for the purpose of determining what is properly before the reviewing court, are hereby abolished," those portions of the record which constituted the old common law record may be considered for error appearing therein, even though the report of proceedings at the trial is stricken. The record before us has been properly authenticated and certified by the clerk of the superior court except as to that portion of it contained in the report of proceedings at the trial, which does not even purport to have been approved and certified by the trial judge or any other judge of the superior court. We are at a loss to understand why the clerk of the superior court accepted the alleged report for filing when it had not been approved and certified by the court. The law provides a remedy for the wrongful failure or refusal of the court to certify a report of proceedings properly presented for approval.

If plaintiff's motion to strike was directed only to the report of the proceedings at the trial and to those portions of the abstract and Erickson's brief and argument based upon such report, it would necessarily have to be allowed for the reason already stated that it was not approved and certified by the trial judge or any other judge of the superior court authorized by law to act in his stead. Since the motion embraces the entire record, and the abstract and brief and argument of Erickson in their entirety, it will have to be denied.

For the reasons indicated herein the order or decree of the superior court of January 17, 1935, is affirmed.

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Friend and Scanlan, JJ., concur.

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while under subsec. 2 of sec. 74, year, 202 or the . rectice dot (oh. 110, III. .t. Bar .tate. 1995) "all distinctions between the common law record, the bill of exceptions and e-rifficate of evidence, for the juryose of determining what is proporly before the reviewing court, are hereby abalished, "those pertiene of the record which convit sator cla compan has read may be consider ered for error appearing therein, rest tage he in report of trocoedings at the trial is stricken. The record effore us his bein properly enthenticated and controlled by the chart of the appeint to trought as to that persion of it contained in as report of proceedings at the trial, which does not wy named to have been approved and sertified by the trust judge or any other judge of whele shit you bush are no and a last as of the court to inverse and month milit to a trees, and extlessed the when when it had not been surroyed an 'ceruified by the court. The law provides a remedy for the wread at litture or refusel of the court to certify a report of proceedings properly preconted for approval.

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For the reasons indicated herein the order or occree of the superior court of January 17, 1935, it strikes.

Friend and Scanlan, JJ., concur.

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MATILDA YOELIN, administratrix with the will annexed of the estate of MICHAEL GORSKI, deceased, et al., Appellees,

V.

JOHN KUDLA et al.,

Defendants below.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

287 I.A. 618³

Rozalia Kudla,

Appellant.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

A decree was entered July 9, 1935, partially sustaining and partially overruling the amended and supplemental report of the master in chancery to whom this cause had been referred. This appeal by one of the defendants, Rozalia Kudla (hereinafter referred to as the defendant) seeks to reverse the decree in so far as it overrules the report of the master.

The original plaintiff, Michael Gorski, filed a creditor's bill and a supplement and amendments thereto, the material allegations of which are that upon his application for adjustment of compensation under the Workmen's Compensation act, an award was made in his favor by an arbitrator of the Industrial Commission of Illinois against John Kudla for injuries sustained July 26, 1921, while working in and about a building at 2459 South Whipple street, Chicago; that upon review by the commission the arbitrator's award was set aside and Gorski's petition for compensation dismissed February 20, 1923; that he sued out a writ of certiorari to the

MATILDA VO. LIN, administratria with the will sunexed of the estate of MICHALL CORES, december, ot als, Appelloss,

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JOHN KUDLA et al., micuments belov.

Rozalie Kudla,

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A decree who entern July 9, 1836, pertially and iming and partially overculing the amended run huplemental report of the mester in chancery to whom this classican selected. This opposite by one of the defendants, roughla such a surfactor referred to as the defendant) seeks to several the accrecing the set again overcular that report of the master.

The original plaintiff, Aiche 1 oreit, 10c content of there bill and a supplement and assemble theoret, the met intition of thich are that upon his opplisation form, but then of compensation under the original form of the next of, normal and in his f vor by an arbitrator of the laborated form a cold to the laborated form of the laborated form and the section of the section of the content of the cold of the laborated was set aside and deriving or the content of the content of the laborated was set aside and deriving partition of the laborary 20, 1923; that he seed out a crit of a criorari to the

circuit court, which entered an order November 3, 1923, reversing the decision of the industrial commission and finding John Kudla liable under the Compensation act for Gorski's injuries; that pursuant to the order of the circuit court the commission entered an award May 16, 1924, a certified copy of which was recorded August 14, 1924; that this award was affirmed by the supreme court October 19. 1929; that by reason of Kudla's failure and refusal to pay said award judgments were entered against him in the superior and circuit courts, respectively, on March 8, 1930, and July 25, 1930, and that there remains unpaid on said judgments \$7,336.69; that John Kudla. the principal defendant, owns real estate and personal property which is concealed or the title to which is held in trust for him by others; that "said principal defendant has since said May 10, 1922, and since said award of May 16, 1924, and the two judgments thereon above set out, put out of his hands, name or possession, by some pretended sale, assignment, conveyance, gift, confidence, bailment or delivery, or by some other secret or cunning device or contrivance, divers other such real and personal property, with intent to deceive, hinder, delay and defraud your orator of his said judgment and other creditors of their just demand, all which property is held in secret trust by the person or persons to whom the same has been so transferred, and with the private understanding or agreement that the same or some interest therein, belongs of right and shall inure to the benefit of the said principal defendant;" that Rozalia Kudla, the wife of John Kudla, holds title to various parcels of real estate, as well as to personal property, subject to the interest of her husband in same: and that title tothis property was so taken in the name of Rozalia Kudla to hinder and prevent the collection of plaintiff's award and judgments.

The bill required the defendants to answer under oath and

circuit court, which entered an order Novamber 3, 1923, reversing the decision of the industrial esmalssion and linding John Hudia liable under the Compensation ast for Gor kils injuries; that pursuant to the order of the circuit court the commission entered an award May 16, 1924, a certified nery of which was recorded umat 14, 1924; that this award was aftirmed by the supreme court Cotober 19. 1929; that by reason of Fudla's fallers and refusal to moser yet award judgments were entered agains him in the superior and circuit courts, respectively, on Froh C, 1930, and July 25, 1930, and that there r mains unpaid on told judgments -7,33(.(9; that John Kudle, the principal defendant, owns real estate and personal property which is concealed or the title to which is held in truct for him by others; that "said principal defendant has since said May 10, 10 cm, and since said award of May 16, 1994, and the two judgments thereon above set out, jut out of his hands, name or possession, by some protonded sale, ansimmer, conveyence, dit, continue, ailment delivery, or by usue other servet or sundar a vice or contrivance, divers other such real and personal property, with intent to deserve, hinder, delay and defired your crater of his said judgment and other jetcus ni uled at vinegorg misha all which to be ereditore trust by the person or persons to whom the same lan bein so transforred, and with the private anderstanding or agreement that the come or some intercut therein, belong of right and shall inure to the benefit of the said primered defendant," that to make Mudle, the wife of John Rudla, holde title to various percels of real estate, as well as to personal property, ambject to the interest of her in ... eand in same; and that title tothis property was so taken in the name of Rosalta Kudla to hinder and privent the collection of plintiff's award and judgments.

The bill required the defendants to answer und r oath and

prayed for discovery, restraining orders against several of the defendants, the appointment of a receiver for the real estate described therein and that the Kudlas be decreed to pay the amounts due plaintiff. Rozalia Kudla filed a sworn answer July 7, 1931, in which she specifically denied all the material allegations of the bill as amended and averred that all the property involved, both real and personal, was purchased with her personal funds.

During the pendency of this litigation John Kudla died March 13, 1934, and while his death was suggested of record in the trial court and the names, ages and addresses of his heirs and next of kin filed therein, the court found in the decree "that it is not necessary to implead said heirs as parties defendant." Plaintiff Gorski died June 9, 1934, and after his death was suggested the bill was amended to include his administratrix with the will annexed of his estate, as well as his heirs and next of kin as parties plaintiff.

The bill sought to have the following property subjected to the lien of the award and judgments: Improved real estate at 2459 South Whipple street, 3848-50 and 3856-58 South Kedzie avenue, all in the city of Chicago, as well as the saloon or coffee shop and the personal property contained therein at 3401 W. 38th street, 20 shares of stock of the Marshall Square State Bank and 50 shares of stock of the Pulaski Goal Company. The bill sought also to have a certain trust deed, in which one Helen Doberstein was named trustee and which was executed by John and Rozalia Kudla to secure the first mortgage indebtedness on the property at 3856-58 South Kedzie avenue, set aside, cancelled and removed as a cloud upon the title to said property, because it was claimed to have been executed and delivered without consideration and as part of the scheme of the principal defendant to prevent the collection of the

proyed for discovery, we training orders and it is a very or the defendants, the appointment of a receiver for the real entate described therein and that the Fudlar he decread so pay the summite due plaintiff. Mosalis hadla filled a sucre enswer July, 1821, in which she appointedly dealed all the metamical allegations of the bill as amended and averner that all the projectly involve, both real and personal, as purchased with her perposed funds.

derch 13, 1934, and while his a view open ted of record in the trial court and the name, open and and records of the hairs and antitied therein, the court court can be excluse taken it is not records to implead and hairs as provides decement. I chain this court died June 1, 1974, a for a his court and and the court and the detail the sale and the sale and the include his a mini training the tile will assume

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South Medate avenue, set acted, remodered and there is a cloud to the title to said property, because it was altime to bown been proveded and delivered without countries of the

o secure the first more and the the secure on and grant or a con-

scheme of the principal housed to be vent the collection of the

award and judgments by plaintiff.

The master found that plaintiffs failed to sustain the allegations of their bill as to each and all of the above mentioned properties and recommended that the bill of complaint be dismissed for want of equity.

Upon the hearing of the exceptions to the master's report same were sustained by the chancellor as to the coffee shop or saloon at 3401 W. 38th street and the improved real estate at 3848-50 and 3856-58 South Kedzie avenue. The master found as to the improved real estate at 3856-58 South Kedzie avenue (also known as lots 10 and 11) "that the said Rozalia Kudla purchased the said premises from Walter Waishwell for the sum of Fourteen Thousand Dellars (\$14,000) of which Five Thousand Dellars (\$5,000) was paid by her in cash with her own funds and Nine Thousand Dollars (\$9,000) by the execution of a purchase money mortgage in the sum of Nine Thousand Dollars (\$9,000); * * * that the trust deed securing the sum of Nine Thousand Dollars (\$9,000) is a valid lien upon the said premises; that the said Rozalia Kudla and John Kudla at no time had any right, title or interest in and to the said trust deed and the principal note secured thereby. " The trust deed above referred to is the trust deed in which Helen Doberstein is named trustee. The exception to the report of the master as to this trust deed was also sustained and the court in its decree found:

"The Court further finds that on February 1, 1925, the principal defendant, John Kudla, and his wife, Rozalia Kudla, codefendant, executed a Trust Deed to Helen Doberstein, who was the wife of Anthony Doberstein, John Kudla's attorney before the Industrial Commission, as security for the payment of Nine Thousand (\$9,000) Dollars, recorded as Document No. 9167127, Book 18016, Page 333, in the office of the Recorder of Deeds of Cook County, Illinois, but the Court finds that there was no consideration for said trust deed and it was made and recorded as a part of the scheme of the principal defendant, John Kudla, and his wife Rozalia Kudla, to avoid paying the compensation to Wichael Gorski, and said trust deed is hereby set aside and cancelled as fraudulent, and as having been made for no consideration, and is hereby removed as a cloud from the title of the real estate described herein as [description of premises] said

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Helen Doberstein having defaulted after being personally served with summons herein, and there not having been any consideration proved herein for said trust deed, and said trust deed is hereby cancelled and set aside and held for naught."

As to the property at 2459 South Whipple street, the decree found that "John Kudla paid for this property and was the real owner thereof," but that its conveyance by Kudla and his wife, Rozalia, to the Lelkos, and by them in turn to Adam and Valeria Smalarz, was not fraudulent and that the deed to the latter should not be set aside. The decree found that plaintiffs waived any interest they might have had in the 20 shares of stock of the Marshall Square State Bank and as to the Pulaski Coal Company stock found "that the 50 shares of stock of the Pulaski Coal Company were sold and transferred to said company. That said transfer and sale was in good faith and for a valuable consideration and that the stock cannot be applied to the payment of the judgments." No cross appeal having been taken by plaintiffs from the findings of the decree as to the Whipple stock. street property, the bank stock or the coal company/ such findings cannot be questioned on this appeal.

As to the improved real estate at 3848-50 South Kedzie avenue (also known as lot 9) the decree found "that on May 15, 1929, Rozalia Kudla, codefendant wife of John Kudla, principal defendant, took title by warranty deed from William Witwicki and wife to the * * * real estate located at 3848-50 South Kedzie avenue, Chicago, Ill., but that the consideration for said conveyance was paid by John Kudla, and it equitably was owned by him, and that said property is subject to a lien for the collection of said judgments of this creditor, Michael Gorski, as alleged in the Bill of Complaint. * * * And that Court finds that the transaction was had in the office of attorney Anthony Doberstein, who represented John Kudla before the Industrial Commission Arbitrator before the first award was entered, and that he was representing Rozalia Kudla and John Kudla

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when title was placed in the name of Rozalia Kudla instead of John Kudla, the real owner; and that it was a ruse to prevent the lien of the award and the judgment that would be finally entered thereon in the appeal of John Kudla then pending in the Supreme court from attaching as a lien to the title of said real estate; and the Court finds that said property is liable for the payment of the two judgments sought to be collected herein for the complainants, and should be sold and the proceeds thereof applied to the payment of said judgments, and the amounts due the complainants, as found in this Decree."

As to the preperty 3856-58 South Kedzie avenue (also known as lots 10 and 11) the decree found "that on November 23, 1925, Rozalia Kudla, codefendant, wife of John Kudla, principal defendant, took title by warranty deed from Walter Waishwell and wife, Mary Waishwell, to the following real estate, but the consideration was paid by John Kudla, for said conveyance and said property was equitably owned by him; and there is no credible proof in the record that Rozalia Kudla ever paid for said property or ever had sufficient money of her own to pay for said conveyance, and that said property is subject to the two judgments of Michael Gorski sought to be collected in this Creditor's Bill proceeding, and that taking title in the name of Rozalia Kudla, was merely a ruse on the part of John Kudla, and his wife, Rozalia Kudla, to avoid payment of the award, certified copy of which had been filed with the Recorder of Deeds on August 14, 1924, prior to said transaction, said property being described as follows and located at 3856-58 South Kedzie Avenue, on the corner of Kedzie and 39th Street, on which the filling station operated by codefendants John Tracey and Henry Tracey, operating as Tracey Bros., is situated: [description follows]. And the Court finds that said property is held in the name of

lies of the eward and the jt jame what order to invity entreed thereon in the cappeal of John Andl. when possible is the ugrees court from attaching as a lies to the till or white or who take the payment and the Court finds that a in party is his ble for the payment of the two judgents cought to be only the fed sentin as the some plainants, and should be cold one the proveds thereof applied to the payment of soid, judgen sit, one the payment of soid, judgen sit, one the payment of soid, judgen sit, one the una unit due the constitute.

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ants, as found in whis learen." As to the property 1866-78 and in the attention of the imount ss lots 10 and 11) the frozee frum? "that on for amound 22, 1155, toralia Rudla, col fendant, tite of John well, cintipal decinders, guard , elic one flow. It worl mount were yoursums we elit door mishwell, to the tallowin rook acte, but the sea if all me oald by John Mudla, for sais converse early property cas equitably owned by him; no that or at the proof in the second fr. hottling and there to your on the thou have after sileroff ted ioney of her our to pay for the conternor, in that a id property ed of the see in the Legicia he atmosphil ext ent of toeldys s. ellected in this drecitor's Bill proceding, an on this wille n the name of Rosalia Kudla, on merely o more main part of John ndla, and his wife, lonalia sucha, to evend segment of the swird, ortified copy of waich he bean fill d ish the Assault of Lords on Manst 14, 1924, prior to make trans ation, and property being escribed as follows and leaveed to 1856-18 would areste by nue, m the corner of Krisie and Oth truct, on high the Milia tation operated by codeff adults John it a year' from perating as Tracey Bros., to situated the entrician allows. and the Court finds that a ic property is held in the same of Rozalia Kudla subject to the two judgments of Michael Gorski sought to be collected in this proceeding, and that the said real estate should be sold and the proceeds of sale applied to the payment of the two judgments and the amounts due under this decree, and that until such sale and application is had, the Court reserves the right to pass upon any application for the appointment of a Receiver to take charge of said property, collect the income and manage the same."

As to the coffee shop or saloon at 3401 W. 38th street. the decree found "that the coffee shop or saloon at 3401 West Thirty-eight street described in the bill of complaint, was the property of John Kudla and was his chief source of income, and that he was at all times the owner thereof, and operated said saloon or coffee shop. The Court further finds that all the personal property in said saloon, and the business itself were still owned and operated by John Kudla, judgment debtor and principal defendant herein, up to the time of his death on March 13, 1934; that said saloon and coffee shop was owned and operated by John Kudla in his own name since its purchase, and more particularly since 1918, and that it has never at any time been owned by Rozalia Kudla: that said saloon and coffee shop was the sole source of income of John Kudla and Rezalia Kudla, except such income as was derived from the real estate, stock, etc., owned by said John Kudla: and the court hereby orders that the said coffee shop or saloon and its fixtures, furniture and furnishings and the business itself be sold as hereinafter provided and the proceeds applied to the payment of the two judgments and all sums due complainants under this decree."

Defendent contends "that the master who had the benefit of observing the demeanor of the witnesses found correctly that the bill should be dismissed for want of equity; that the weight of the evidence was with the defendants and that separately from that the

As to the entree elope of them a fit , with truth, tre Trans. moder to come the tell tens bence beach said Thirty-eight street described in hills of complete the property of John Rudla en we like this core of income, and that he was st all time the one is a second sent lin to sew of tent saloen or coffee show. The Court for ther I me that all the personal property in cale along and the bulines it all were still owned and operated by John Eacle, judgment | bfor and principal defendant herein, up to the time of his costs on March 13, 1934; that said calcon and softer and and and and operated by John Kudla in his own new that it purence, and note particularly since 1918, an that it is now at a since oven owned by porum slo. old s. . . o o . . for a mod a visa tent ; sibul slisson of income of Join Madl. on the Mu It, except end to me us was derived from the real tota, stock, that, out the self from Ending and the court is no or the time at the art section of seloon and its fi ture, in if the a mailting a telm incess itself be sold as hersingful provided to the pince of a died to the payment of the two ju 1 ato an 11 un to and in ate mader this decres."

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plaintiff did not produce sufficient evidence to sustain the allegations of fraud in the face of the sworn answer of the defendant. The defendant further contends that the entry of a decree against John Kudla after his death without making his heirs parties defendant invalidates the entire decree. Further, that the cancelling and removing of the \$9,000 mortgage as a lien from Lots 10 and 11 without having before the Court the owners of the notes or trust deed is manifest error."

Plaintiffs' theory, as stated in their brief, is as follows:

"(1) The court had full authority to either affirm or overrule the Master's report, or to partially affirm and partially overrule as was done in this case. A Master's report is only advisory.

"(2) Order as to change of parties is within the discretion of the court under Section 152, Par. 28, Chapter 110. (Saving Clause as to Change of Parties.) No administratrix had been appointed for John Kudla, and the only necessary change, the personal represen-

tative of Michael Gorski, complainant, was made.

"(3) The court did not err in cancelling out the void and fraudulent mortgage to Helen Doberstein who was personally served with summons and a rule requiring her to answer in five days, and ignored both. The trust deed recites on its face that it was given to secure only one mortgage note to Helen Doberstein, and was due in five years from its date, December 1, 1925. There is no renewal, release or transfer of said trust deed and no extension of record. It was properly cancelled. * * * There are not any outside owners or holders of record, and none complaining herein."

We agree with defendant's statement in her brief that "this case turns on the question of ownership of the coffee shop at 3401 W. 38th street" because the record discloses that this coffee shop was the sole source of income available to either John Kudla or his wife Rozalia Kudla, for investment in the real estate or stocks heretofore enumerated, except such income as may have been derived from the aforementioned real estate and stocks after their acquisition.

Although the proofs of both sides on the original hearing before the master were closed February 18, 1933, long prior to the death of John Kudla March 13, 1934, he did not testify at all in this proceeding. The Kudlas were married in 1910. The testimony of Rozalia Kudla that she, in partnership with Michael Gorski, pur-

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chased the coffee shop in question in 1914 from one Felix Janes with \$950 of her own money, which she had brought with her from Massachusetts, and that about seven months later she dissolved her partnership with Gorski by paying him \$250 for his interest, is undisputed. Janes corroborated Rozalia Kudla's testimony as to her purchase of the coffee shop from him.

while, as heretofore stated, the findings of the decree as to the Whipple street property and the stock of the bank and coal company are not subject to review on this appeal, the evidence bearing upon those matters may be properly considered by this court in so far as it throws light on the main issue as to the ownership of the coffee shop and the investments involved here, which are traceable to the income drived from such coffee shop.

Regardless of the method or manner of the original acquisition of the coffee shop or saloon or of who was its original purchaser, the documentary evidence in the record shows, in our opinion, conclusively that John Kudla was the owner of the business, at least since 1917.

December 17, 1917, John Kudla, to secure his indebtedness of \$1,000, executed and delivered to The Bartholomae & Roesing Brewing & Malting Company his chattel mortgage (recorded August 23, 1918) covering the following goods and chattels: "16' bar, 16' back bar, 16' mirror & frame, 16' iron footrail, 4' cigar case, 4' bottle case, 3' x 4' wine box, 21' window screens, 10' vestibule, 4 tap beer pump outfit with all bar & ice box plumbing & connections complete with 1 ice box, water faucet complete, 14' 10'' Zinc workboard, 30'' coeler, 12' skid, 15/1 basement, 6 stools, 30 chairs, 2 square tables, 2 round tables, #20 Volcano Stove with boiler and all other personal property of said mortgagor (except household goods, wearing apparel and mechanic's tools), including saloon or restaurant furniture, fixtures and glassware and the stock of wines, liquors, cordials

chesed the orfice shop in her ion in a form of his Leads with \$950 or her own money, which was his ironal attained in that "bout seven mouths hit out in a reverse partnership with Boreki broweld in 300 or his in a series wadisputed, Janos corroborated no alla bullet teath of the coffee shap from him bullet teath of the coffee shap from him.

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and cigars, which now is or hereafter, until the indebtedness hereinafter mentioned shall be fully paid, may be in and about the premises known as number 3401 W. 38th street, and also the leasehold interest of said mortgager now held or hereafter acquired by him in and to the premises in or about which the above described goods and chattels now are."

as fully paid to John Kudla as follows: 10 shares October 4, 1918, 20 shares July 16, 1919, and 20 shares September 19, 1919. The 50 shares represented by these three certificates were assigned on the back thereof by Kudla to the Pulaski Coal Company June 12, 1923.

The ledger sheets covering the chacking account of John Kudla in the Marshall Square State Bank were received in evidence. An approximation of his total deposits and checks drawn against this account is as follows for the periods indicated:

| "Dates | | | | | | Checks | Deposits. | |
|--------|--------|-----|-------|-----|------|-------------|-------------|--|
| May 11 | , 1920 | to | Dec. | 30, | 1920 | \$12,967.75 | \$13,114.22 | |
| Jan. 3 | , 1921 | to | Dec . | 19, | 1921 | 17,792.49 | 18,887.57 | |
| Jan. 3 | , 1922 | to | Dec . | 29, | 1922 | 18,011.03 | 17,974.40 | |
| Jan. 3 | , 1923 | to | Dec. | 27. | 1923 | 30,405.06 | 29,470.78 | |
| Jan. 2 | , 1924 | to | Dec . | 22, | 1924 | 29,124.51 | 29,138.33 | |
| Jan. 5 | , 1925 | to | Dec. | 31, | 1925 | 23,936.73 | 24,115.77 | |
| Jan. 4 | , 1926 | to | Dec . | 22, | 1926 | 2,955.24 | 2,768.55 | |
| Jan. 3 | , 1927 | -to | Dec . | 22, | 1927 | 3,145.01 | 3,162.18 | |
| Jan. 4 | , 1928 | to | Dec. | 31, | 1928 | 4,801.95 | 4,859.04 | |
| Jan. 5 | , 1929 | to | Apr. | 21, | 1930 | 1,101.86 | 969.30.# | |

The ledger sheet from the records of the same bank shows the following deposits and withdrawals from the savings account of John Kudla:

| "Date | Withdrawals | Deposits | Balance |
|-------------------|---|-----------|-----------|
| May 3, 1920 | | \$ 400.55 | \$ 400.55 |
| July 1, 1920 Inte | rest | 2.00 | 402.55 |
| July 2, | 777. | 7597.45 | 8000.00 |
| July 20, | | 1000.00 | 9000.00 |
| July 29, | \$1000.00 | | 8000.00 |
| Sep. 16, | *************************************** | 1500.00 | 9500.00 |
| Sep. 21. | 1000.00 | | 8500.00 |
| Oct. 21. | 8485.00 | | 5.00 |
| Interest to Jan. | 1. | | |
| 1921 | | .07 | 5.07 |
| Apr.4. | | 800.00 | 805.07 |
| Apr.4, | 800.00 | | 5.07. |

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| 7 | | Jan. 3, 1921 to sec. 16, 1911 | | |
| / 4 E - (1 | 5. 4 3. C & 6. C | Jan. 3, 1923 to sec. 17, 1985 Jan. 2, 1924 to dec. 11, 1876 | | |
| 77.1.27 | S. 1. 6.5 | Jan. 6, 1985 or wee. 31, 1925 | | |
| The state of the s | Miller Control of Control Little Processing | Jan. 4, 1926 to D.s. 74, 1926 Jan. 5, 1927 to Des. 22, 1927 | | |
| 34 · · · · · · · · · · · · · · · · · · · | 3 F 3 | Jan. 4, 1927 to 00 01, 1908 | | |
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| 88 x 116 12 " | determine. | | | May 3, 1920 |
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| | | | ed: 10:14. | Interest to 3 |
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"It is conceded that the \$8,495 shown above to have been withdrawn from this savings account October 21, 1920, was used to make the cash payment on the purchase price of the Whipple street property, which was conveyed to John Kudla and Rozalia Kudla as joint tenants.

Although when it was purchased November 23, 1925, title to the property at 3856-58 South Kedzie avenue was taken in the name of Rozalia Kudla alone, upon its lease to one Harrison for a gasoline filling station September 14, 1929, said lease was executed by both John and Rozalia Kudla.

August 13, 1931, when the Phillips Petroleum Company contracted for a sublease of the last above mentioned premises from one Tracey, the owner's consent was indicated thereon as follows:

"As the owner of the fee title to the premises described in the within lease, I hereby consent to the same and agree to all of the terms and conditions thereof.

John Kudla."

The master improperly excluded a certified copy of a criminal information filed in the United States District Court charging John Kudla, Frankie J. Kudla and Rose Kudla with violation of the National Prohibition act April 20, 1932, in and about the "saloon" at 3401 W. 38th street, as well as a certified copy of the sentence and judgment of the court that John Kudla pay a fine of \$150, that Frankie J. Kudla pay a fine of \$50 and that Rozalia Kudla pay a fine of \$1 upon the defendant's plea of nolo contendere. This evidence was competent at it tended to show John Kudla's interest in the saloon business on said premises.

Pages were introduced in evidence from the summer and
November editions of the general and classified Chicago Telephone
directories for the years1931 and 1932, which carried the following:
"KUDLA Jno coffee shop 3401 W 38th St. LAFayette 4691."

Documentary evidence in the record shows that John Kudla

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applied for and received upon his payment of \$150 a retail beverage dealer's license for the premises at 3401 W. 38th street, for the last half of the year 1933. There is also in the record a receipt of January 2, 1934, by the City Collector of the City of Chicago to John Kudla for \$250 "same being a deposit paid in advance in connection with an application for a retail liquor dealer's license for the premises" at 3401 W. 38th street.

It was not until after John Kudla's death March 13, 1934, that his wife made an application to the city collector for the issuance of "a city retailer's license for the sale of alcholic liquor" to her for the term ending June 30, 1934, in which application she certified to the following facts:

- "1. Applicant's full name Rose Kudla, 3401 W. 38th St.
- 2. Location of place of business for which license is sought 3401 W. 38th Street, Chicago, Illinois, 2 story building store front first & second floor occupied by applicant.
 - 3. State principal kind of business Retail liquor
- 4. Date on which foregoing business was begun at this location October 10, 1914.
- 5. Date on which applicant began selling alcoholic liquer at this location December 15, 1933.

Either from his own knowledge of the facts or from information which it is reasonable to infer he received from Rozalia Kudla, the investigating officer in his report attached to her application for the license stated "This business was conducted by applicant's husband, who is now deceased."

The above documentary evidence demonstrates beyond doubt that John Kudla until the time of his death was the owner at least at a since 1917 of the saloon or coffee shop which was the sole source of the income that went into the various investments of the Kudlas. Rozalia Kudla in a feeble attempt to meet this incontrovertible proof of her husband's ownership of the coffee shop simply states that she did not have time to take care of the banking end of that business and that it was more convenient for her to run the coffee shop in her husband's name. Both the allegations of her sworn

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answer and her testimony before the master are refuted by her sworn answers in her application for the retailer's liquor license wherein she stated that, while liquor was sold at retail upon the premises at 3801 W. 38th street since October 10, 1914, she, herself did not begin selling liquor there until December 15, 1933, shortly prior to her husband's death.

It is urged that since the bill of complaint charging that John Kudla owned the coffee shop required an answer under oath, and since Rozalia Kudla's sworn answer denied that John Kudla was the owner thereof, it was incumbent upon plaintiffs to overcome such answer by the evidence of two witnesses or of one witness and circumstances equal to that of another; and that since only documentary evidence was offered in support of the claim of ownership of John Kudla, Rozalia Kudla's sworn answer must prevail. It is sufficient answer to this contention to state that, in addition to the documentary evidence, three witnesses, Smalarz, Obrzut and Czonstka testified, in effect, that John Kudla operated the coffee shop in question. While the testimony of these witnesses may not have furnished the best evidence of Kudla's ownership of the coffee shop it is in the record, and coupled with the convincing documentary evidence heretofore set forth it is, we think, more than ample to meet the requirements of the rule relied upon by defendant in her instant contention.

The record is replete with other evidence of the intent and design of John Kudla and Rozalia Kudla to wrongfully prevent and defeat the collection of Gorski's award and judgments, but we think sufficient has been shown.

We are of the opinion that the improved real estate at 3848-50 South Kedzie avenue and at 3856-58 South Kedzie avenue, title to which was taken in the name of Rozalia Kudla, but which was purchased with income from the coffee shop at 3401 W. 38th street, of which John Kudla was the owner, was properly held to

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be subject to the lien of the judgments based on Gorski's compensation award and that the chancellor properly ordered and
directed that such premises, as well as "the coffee shop or saloon
and its fixtures, furniture and furnishings and the business itself,"
should be sold and the proceeds applied to the payment of the two
judgments.

As to the finding of the decree that the trust deed from John Kudla and his wife, Rozalia Kudla, to Helen Doberstein, as trustee, was executed without consideration and as part of the scheme of the Kudlas "to avoid paying compensation to Michael Gorski," we think that the chancellor was clearly in error. When the property at 3856-58 Kedzie was purchased from Waishwell in the name of Rozalia Kudla on November 23, 1925, for \$14,000, \$5,000 was paid in cash and the balance of \$9,000 by the execution of a purchase money mortgage in that amount secured by the trust deed to Helen Doberstein. There is not a scintilla of evidence in the record that Helen Doberstein ever had any interest in this \$9,000 mortgage indebtedness except as trustee, but the record does show that Waishwell, from whom this property was purchased, took back this mortgage as part payment of the purchase price and later sold it to one Rybinski for \$9,000. The trust deed to Helen Doberstein securing the \$9,000 indebtedness against the property is a valid lien upon same and John Kudla and Rozalia Kudla never at any time had any right, title or interest in or to the said trust deed or the principal note secured thereby. That portion of the decree setting aside and cancelling this trust deed and removing it "as a cloud from the title" to the property in question must, therefore, be reversed.

It is also urged that since John Kudla died March 13, 1934, more than two years before the decree was entered, his heirs became necessary parties and that since they were not impleaded the decree

be subject to the lien o the jurgment; here it has pensation award and that the charally or - Iron - Iron directed that such premires, and all a "the period or early or and its fixtures, furniture and authorized the sold and two properties of the pold and two properties of the properties of the properties of the properties.

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As to the finding of the december to the transfer of the John Mudla and Pic wife, Coulic runks, so be len poternation, to trucke of to emenor of the deal of the main and the transfer of the Ruller "to avoid paying compensation to high I for his," . think hat the chancellor was clearly in curor. hen the property at 3056-Fe Redaic was purchased from salshwell in the near of or his well on Movember 20, 1925, for lessely, 50,000 ... galo in a ... and the balance of -9, 0 t by t careabion of the probability contract in that amount secured by the trust deed to inten oberetein. There is not a saintills of vidence in the meson that I live Tober this ever had any interest in this 3.30% arritas a industrians . cosent as trustee, but the record code show that the fig. can been as property was surdused, tout buck this most speaks as pour trongs of the purchase price and later sold it to one of the limit of C. . The trust deed to Helen Dob "stein: Durin the the the the against the property is a valid line on the same as all unline Rosalia Kudla never at any time an any iliti, itile or interest in or to the said trust dead of the principal wot. serter of alle That portion of the decree witting which william with the deed and removing it "as a clour from the diffe" ... - 1 ... "T in question must, therefore, be revered.

It is also urged the tollar John Julia in the late tollar, it is not become more than two years before the scarce as the not impleaded the occreen

is erroneous. It is readily apparent that the question raised by this contention does not involve any interest of Rozalia Kudla and that the matter complained of did not injuriously affect any of her rights.

We reserved to hearing plaintiffs' motion filed October 21, 1935, "for leave to amend the pleadings and decree entered in the Circuit court from which this appeal is prosecuted, instanter on their face, to correct the legal description of the premises at 3848-3850 South Kedzie avenue, one of the properties held liable for the collection of the judgments on which said decree is based, and ordered sold to satisfy the sums found due in said decree, by inserting before the words 'Lot Nine' wherever they appear, the words 'Lots Seven (7), Eight (8).'" This motion will necessarily have to be denied at this time because we have no way of knowing that the proposed amendment merely involves a mistake in the legal description. If that is all it does involve it may be properly presented to the trial court.

For the reasons stated herein the decree of the circuit court is affirmed except as to that portion of it which orders the cancellation of the trust deed on the premises at 3856-58 South Kedzie avenue, executed by John and Rozalia Kudla to Helen Doberstein and the removal of same as a cloud on the title to that property. In so far as the decree pertains to this trust deed or rights accruing under same, it is reversed.

AFFIRMED IN PART AND REVERSED IN PART.

Friend and Scanlan, JJ., concur.

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Friend and canlan, ..., concur.

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BERNICE MOTTZ,
Appellee,

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PAUL MOTTZ,

Appellant.

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APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

287 I.A. 6184

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Bernice Mottz filed an action for separate maintenance against her husband, Paul Mottz, charging cruelty in June, 1931, August, 1931, March, 1932 and November, 1933, and desertion in November, 1935. Defendant filed a cross bill for divorce, charging desertion. The court found the issues in favor of plaintiff, entered a decree of separate maintenance, specifically finding that defendant had been guilty of extreme and repeated cruelty in the month of June, 1931, August, 1931, March, 1932 and October, 1933, and also finding that defendant had willfully deserted and abandoned plaintiff without any reasonable or just cause therefor in the month of November, 1933. Defendant's cross bill was dismissed for want of equity, and this appeal followed.

The parties were married July 27, 1918. Paul Mottz is and has been an employee of the Illinois Central Railroad Company since prior to the marriage. His place of business is located at 208 South LaSalle street, Chicago. Prior to the marriage plaintiff was engaged in the business of dressmaking, and she continued in this enterprise after the marriage of the parties. Her earnings at one time varied from \$150 to \$200 a month and

BERNICE MOTTZ, Appellec,

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PAUE HOTTE,

Appellant.

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Bernies Notts filed an action for seperate to intended against her husband, Poul Notts, charging crueity in June, 1931, August, 1931, March, 1932 and Accember, 1933, and descriton in November, 1933. Defendent filed a cross bill for diverce, charging descriton. The court found the issues in favor of plaintiff, entered a decree of separate maintenance, specifically finding that defendant had been suilty of extreme and rejected crueity in the month of June, 1931, August, 1931, March, 1932 and cleoted and October, 1933, and cleo finding that of and abandoned plaintiff without any rescondity or just descrited and abandoned plaintiff without any rescondity or just cause therefor in the month of November, 1933. Select or just cross bill was dismissed for went of county, and blue appeal

The parties were married July 27, 1816. Rul Motte in and has been an employee of the Illinois Centual Rilread Duply's since prior to the marriage. His place of burings is how test of 208 South LaSalle street, This of Prior to the marriage claimetiff was engaged in the businers of from miline, and he continued in this enturprise of the marriage of the parties. Her carnings as one time valied from 2150 to 200 a month and

were deposited in a joint bank account and used for payment of family expenses and applied on the purchase of some vacant property by the parties. Following their marriage, Mr. and Mrs. Mottz resided with plaintiff's mother for about a year and thereafter occupied several apartments of their own on the south side of Chicago, near defendant's place of business. In 1926 plaintiff, together with defendant's sister, opened a dressmaking shop at 50th street and Harper avenue in Chicago. Two years later plaintiff sold her interest in the business to defendant's sister, and in the spring of 1929 the parties moved to Bloomingdale, Illinois, near Elmhurst. In May, 1931, they moved from Bloomingdale into a seven room house in Elmhurst, where they occupied six rooms and undertook to care for the father of the owner of the house, who occupied the other room. In consideration of this service Mottz paid only a nominal rental of \$10 per month. In July or August of 1931 the parties looked at some apartments on the south side of Chicago. There is some dispute as to the date, defendant contending that this took place in September, 1931, and plaintiff fixing the time as 1933. In the meantime defendant took a room at the Carolan hotel, which he left June 1, 1932, took a room in a private home until the first of January, 1933, when he moved to the Versailles hotel, where he continued to reside at the time of the trial. Between October, 1931, and the spring of 1932, the parties visited each other, defendant spending some of his week-ends at Elmhurst, and plaintiff coming to stay with defendant occasionally during the week at the Carolan hotel. It is evident that between 1931 and the final separation of the parties in November, 1933, defendant sought to persuade plaintiff to give up the home in Elmhurst and the business of dressmaking and come to live with him on the south side in Chicago, near his place of business, and that most of the difficulties between the parties arose out of the apparent

to from a for the u but account and a for a mental of family expenses and applied on the purchase of one vecant property by the parties. Following their marris c, in the Is. Motta resided with plaintil's madhar for body - year ent bleseafter occupied several cuartmerts of their one on the south eide of Chicago, mear defendant's place of burdens. In 1922 pt incity, together with defendant's mister, opened a dramatin app so 50th street and Harper avenue in Adamso. Two year, later lininging sold her interest in the busine to defendant! Itter, and in the spring of 1929 the parties moved to bloomingdale, Illinoi., mean Elmhurst. In May, 1931, they moved from Plocemingdele irog a seven room house in Minhurst, where they occupied the reme and undertook to care for the father of the owner of the house, man occupied the other room. In consideration of this service Totis paid only a nominal reptal of \$10 per month. In July or unust obis duto, wit to strent to go some to boulded testing out 1921 to of Chicago. There is some dispute as to the date, daffingent contending that this took place in "sptumbor, 1991, and which the fixing the time as 1933. In the meretime defendent that a room at the Garolan hotel, which he left June 7, 1934, oft a rom in a private home until the first of a nurs, 1000, the a moved to the Versailles hotel, where he continue to to the the trial. Buttagen Octobur, 1931, an dec in a large parties visited cach other, actions of maintain on the contract at Manuret, and plaintiff comin to thy with the property bas terminal to during the week at the darral m hotel. It is the test to deat be the 1931 and the final separation or the parties in orthogon, him, defendant sought to persuade plaintill to eav no the lease in Elmhurst and the busine s of drosemaking and a mo to live with and on the south side in Chicago, near his place of huninese, and that the age out to two enough asiting out to be the appropriate and to two unwillingness of plaintiff to give up her business as a dressmaker and the home in Elmhurst and make her domicile with defendant in Chicago.

The first act of cruelty charged is alleged to have occurred in June, 1931. Mrs. Mottz testified that her husband became angered while they were riding along in an automobile and swerved the car toward the ditch; that when she turned off the ignition he knocked her arm and bruised it. Mottz denied this incident, and there was no corroborating evidence. It is highly improbable that Mottz intended to run the car into a ditch, and the legal presumption would be against his doing any act which would equally endanger his own life. Certainly there is no indication from the evidence that he intended to commit an act of cruelty against plaintiff.

The second indicent charged is alleged to have occurred in August, 1931. Mrs. Mottz states that her husband kept her awake until early in the morning, took her belongings and threw them all over the house, and put her out, and that the next day she went to Wheaton and instituted suit for divorce; that she went back to the house the afternoon the bill was filed and stayed there over nighto On the evening that summons was served upon defendant Mrs. Mottz still continued to live with her husband as his wife. The acts complained of on this occasion would not constitute cruelty under the authorities in this state.

The third act of cruelty is alleged to have occurred in March, 1932. Mrs. Mottz had continued to operate her dressmaking establishment in Park Ridge, notwithstanding the repeated requests him of her husband that she join/in his domicile on the south side of Chicago. On this occasion Mottz, evidently angered by these circumstances, wrecked her dressmaking shop in Park Ridge. Mrs. Mottz testified to no injury to herself, and certainly there was no proof of any intention on his part to inflict bodily injury upon her.

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The first not of cruelty charged is alleged to have occurred in June, 1981. Mrs. Motts togisted that her husband become ampered while they were riding then in the tensories of the initial her are ditch; that when the turned off the initial he knowled her are and bruised it. Notth comied this injurent, and there are no corroborating evidence. It is hi hly improbable that Motts in-tended to run the car into a litch, and the legal presumption would be against his doing any act which would one into earlier his comittee. Cortainly there is no indignation in the life. Cortainly there is no indignation in the plaintiff.

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estified to no injury to bereckf, and certainly there was no proof any intention on his part to inflict bodily injury upon her.

The last charge of cruelty is fixed as October, 1933. It is at variance with the allegation in the bill, which fixes the time as November, 1933. On that occasion, according to the testimony of Mrs. Mottz, her husband came to a party in her apartment at Park Ridge, after having told her that he would not be able to be present, and forcibly ejected one Hawkins from the apartment.

Mrs. Mottz and Mrs. Hawkins tried to interfere, and were pushed aside. If Mrs. Mottz was injured as she stated, it was incidental to the scuffle, but there is no indication that her husband willfully inflicted any injury on her, and Mrs. Hawkins, who was present and testified at the trial, did not testify that Mottz inflicted any injuries on his wife.

All the foregoing incidents occurred after the parties began to live separate and apart from each other, and none of these charges is urged as the cause for the separation. Substantially all the acts of cruelty charged and found by the court to have been extreme and repeated, grew out of alternations between the parties resulting from plaintiff's refusal to give up the Elmhurst home and dressmaking establishment and live with defendant. Voluminous testimony was adduced at the hearing tending to prove plaintiff's charges of cruelty on the one hand and defendant's denial thereof, but the burden of every complaint is lodged in the fact that Mrs. Mottz refused to adopt the domicile of her husband and accede to his wishes that they live at a place on the south side in Chicago which would be more accessible to his place of business. Although condonation was not pleaded by defendant, it is conceded by plaintiff that "from the time defendant moved to the Versailles hotel January 1, 1933, the plaintiff frequently spent the night with defendant at his room, " and the evidence indicates that notwith standing the charges of cruelty made by Mrs. Mottz the parties were on friendly terms until their final separation in November, 1933.

All the foregoing indidents occurred after the parties began to live separate and spart from a chother, and none of these charges is arged as the cause for the separation. Substantially all the acts of cruelty charged and found by the court to have been extreme and repeated, grew out of alterestions between the parties realting rim plaintift's refeaal to give up the lahurst bome and dressaking asw wromiting augminutov .tm.bneleb Aliv evil bos tremmaifustee adduced at the hearing tending to prove plaintiff of the of orwelty on the one hend out of ferdant's demial thereon, but the burden of every compleint is lodged in the fact that the liette refused to adopt the dericale of her larbers are accede to his wishes that they live et a lace on the couth side in Chica o which would be more accessible to his place of business. Attough condensation was not planded by defendent, it is goodser by it is that "from the time ded yount moved to the William the botal January 1, 1933, the plaintin frequently pent the mi ht liter defendant at his room," en the wyidence indicates that -sealth anding the charges or cru lty mare by Mrs. Lotts the perties here on friendly terms until their Tinal separation in Movember, 1933. Apparently their only differences were based upon and grew out of Mrs. Mottz's persistence in residing separately and refusing to make her domicile with Mr. Mottz. The rule is well settled that the statute governing separate maintenance, being in deregation of the common law, must be strictly construed (Short v. Short, 265 Ill. App. 133; Wessor v. Wasson, 236 Ill. App. 505) and that a complainant who seeks to be maintained separate and apart from her husband must show not only that she has good cause for living separate and apart but that she does so without any fault on her part. (Decker v. Decker, 279 Ill. 300.) The circumstances of this case do not indicate that Mrs. Mottz lived separate and apart from her husband because of any acts of cruelty committed by him, but because she chose to do so.

It is the established rule of law in this state that the family demicile is that of the husband. (Davis v. Davis, 30 Ill. 180.) If Mr. Mottz desired to change his domicile, and actually moved to Chicago as is indicated by the undisputed evidence, Mrs. Mottz was legally charged with the duty of following him to his new location. (Hunter v. Hunter, 7 Ill. App. 253; Houts v. Houts, 17 Ill. App. 439.) Having refused to do so, without justification, she cannot be separately maintained. (Kennedy v. Kennedy, 87 Ill. 250.) Mr. Mottz's insistence that his wife move to Chicago was net at all unreasonable. He was able to maintain her in a domicile of his own selection. His place of business was located in the loop in Chicago. While they lived in Elmhurst he had to drive approximately four miles to the interurban electric and then proceed by rail to the loop and from there to his office. He preferred to live on the south side in Chicago, where transportation facilities brought him to his place of business more conveniently and in shorter time. Mrs. Mottz's refusal to accede to his request, when persisted in over a period of years, constituted desertion on

Apparently their cm., "if erences ser allow upon and a cut of line. Motta's persistence in residing separately an residing to make her domicile with Mr. Motta. The state as elected that the charte governing sept to selected actions, but a charte governing sept to selected the common law, must be sailedly constance (think v. 1125, 265 of the common law, must be sailedly constance (think v. 1125, 265 lill. App. 133; Merson V. Masson, 256 lill. ... oco) with the common states of the common

Ill. App. 133; Senser v. Massen, 256 Ill. ... and) with the complainent who seeks to be and obtained a part. to an apart from the husband must show not only that the ana you and that that she does so dishous my walls on as part. That she does so dishous my walls on as part. (Docker v. Tooker, 279 ill. 300.) The distractions of this case

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her part.

We have examined the record in this case carefully, and have reached the conclusion that the court erred in decreeing separate maintenance in plaintiff's favor and should have awarded defendant a decree for divorce on ground of desertion. Inasmuch as the entire record is before us, and the cause was heard by the court without a jury, it will be unnecessary to remand the cause for rehearing. The decree of the circuit court is reversed and the cause remanded with directions that a decree be entered in favor of defendant on ground of desertion in accordance with his cross bill of complaint.

DECREE OF THE CIRCUIT COURT REVERSED AND THE CAUSE REMANIED WITH DIRECTIONS THAT A DECREE BE ENTERED IN FAVOR OF DEFENDANT ON THE GROUND OF DESERTION.

Sullivan, P. J., and Scanlan, J., concur.

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ROSE GIANNOLA, Appellee,

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GREAT NORTHERN LIFE INSURANCE COMPANY, a corporation, impleaded with GUARANTEE TRUST MUTUAL BENEFIT ASSOCIATION, a corporation, Appellants. APPEAL FROM MUNICIPAL COURT OF CHICAGO.

287 I.A. 619

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Rose Giannola brought a fourth class contract action in the municipal court involving an accident insurance policy issued by the Great Northern Life Insurance Company (hereinafter called the Great Northern) and sold by the Guarantee Trust Mutual Benefit Association (hereinafter referred to as the Guarantee Trust) to one Maria Passalini. Plaintiff, as the beneficiary named in the policy, had originally instituted suit against the Guarantee Trust alone, but subsequently impleaded the Great Northern by amending her statement of claim. The cause was heard by the court without a jury, resulting in findings and judgment for \$500 against both defendants, from which this appeal is prosecuted.

It appears from the record that Guarantee Trust is a mutual benefit association organized under the laws of this state to write life insurance. Great Northern is a life, accident and health insurance company, organized under the laws of Wisconsin and licensed to do business in Illinois, with its executive offices located in Chicago. Under an arrangement between these two companies, Great Northern issued accident

ROSE GLAHVOLA, Appellee,

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GHEAT NONTHERM LIFE INSURABLE COMPANY, a corporation, impleaded with GUARANTER TRUST MUTUAL REMARKED AS COrporation, Appellants.

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MR. JUSTICE TRIMED DELLVE OF THE OPICE OF THE CULT.

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policies to Guarantee Trust for its members, which were to remain in force so long as the premium of two cents a week was paid to it in advance by the Guarantee Trust, and so long as the insured remained a member in good standing of the Guarantee Trust.

In September, 1933, the Guarantee Trust sought to increase its membership and as part of the campaign made arrangements by which an application for membership in the association which provided certain life insurance benefits and the payment of \$3 should also include an accident insurance policy issued by Great Northern. September 27, 1933, one J. V. Griseto solicited plaintiff for the sale of such a membership and presented his card showing him to be a representative of Guarantee Trust. He took the application of Maria Passalini, plaintiff's mother, as well as that of plaintiff's husband, for membership in the Guarantee Trust. A receipt, printed on the form of Guarantee trust, showing the receipt of \$3 by the Guarantee Trust, was then given to the insured, who at the time paid Griseto \$3. The face of the receipt contained the following: "To be applied as a membership fee to the Guarantee Trust Mutual." It appears that Griseto sold policies, not only to plaintiff's mother and husband, but also to friends of the Giannola family. Three of the parties to whom these policies were sold testified at the hearing. The evidence is quite voluminous. All the witnesses stated positively that Griseto represented to them that \$1 of the \$3 paid for each membership in the Guarantee Trust was to be applied toward the payment of premiums for one year in advance on the Great Northern accident policies. Griseto denied these representations and stated that he told plaintiff's mother and the other applicants as well that only fifty cents of the \$3 paid with each application was to be applied to the Great Northern accident policy as six months premium in advance. So far as the documentary evidence is concerned, there is nothing in the receipt

policies to Guarantee Trust 10% its members, which were coremin in force so long as the premium of two cents a week was paid to it in advance by the Guarantee Trust, and so long as the inaured remained a member in good standing of the Guarantee Trust.

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accident policy as six menths pression in advance. To far as the documentary evidence is concerned, there is nothing in the receipt

from which it could be determined how the \$3 was to be apportioned between the two companies. The receipt merely states that the Guarantee Trust has received \$3 from the applicant to be applied as a membership fee and that no liability is assumed by the association unless the application is accepted and the certificate delivered to the applicant during his or her lifetime and while in good health. There is a notation on the back of the application stating that "the membership fee is \$2.50 which payment keeps the certificate in force for 30 days after the certificate is issued." It is argued by appellants that the applicant should have understood from this notation that the remaining fifty cents would be applied on the accident policy, and that if Griseto told her that \$1 thereof constituted the premium on the accident policy for one year she should have known that he was not telling the truth. The application on its face contains a list of various personal questions which were required to be answered by the insured, and at the bottom thereof contained a line for the insured's signature. Assuming that the applicant took notice of the notation on the reverse side of the application stating that the membership fee of \$2.50 keeps the certificate in Guarantee Trust in force for thirty days, she still could not have ascertained the length of time for which the premium was paid on the accident policy without consulting the Great Northern policy. There is no other documentary evidence of which the applicant had notice which would have contradicted the representations attirbuted to Griseto that \$1 of the \$3 paid was to be applied toward the Great Northern policy. From a careful examination of the record we are convinced that there is abundant evidence to sustain the court's finding that Griseto made such representations as the various witnesses testified to, notwithstanding Griseto's denial thereof. Moreover, insurance contracts are more or less difficult for the average layman to understand, and the record discloses that plaintiff's

finalizati it could be determined how by 40 war to be apportional between the two companies. The receipt menely that a that Cuarantee Trust has received \$5 from the applicant to be a miled as a membership fee and that no liability is assumed by the association unless the application is accepted and the cartificate delivered to the applicant furing his or her lifetime and while in good health. There is a notation on the back of the application stating that "the membership fee is \$1.50 which payment keeps the certificate in force for 30 days after the certificate insued." Lt is argued by appellants that the applicant chould have understood from this notation that the remaining fifty contaconald be availed on the secident policy, and that Griceto teld has that all thorser constituted the premium on the accident policy for one year she should have known that he was not telling the truth. The spalioniten on its face contains a list of various personal sucstions which wors required to be answered by the insured, and at the bottem thereof contained a line for the incured's signiture. Assumin that the applicant took notice of the notation on the records side of the application stating that the membership fee of \$2.50 keeps the certificate in Guarantee Trust in force for thirty days, she still could not have ascertained the longth of the for which the premium was paid on the meddent policy without convaling the freat Worthern policy. There is no other cooks misky vidence of lich the applicant had metice which would have controdicted the representations attirbuted to Crise to that of the S pais we to be applied toward the Great Morthern policy. From a carrial cx win dien of the "Foord we are convinced that there is abundent evidence to suit that the aucha v and as ample the representation acor some of sind that a trace

Moreover, insurance contracts ere more or less difficult for the average laymen to understand, and the record discloses that plaintiff's

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mother, and in fact all the witnesses who testified in this case to whom policies were sold, were parties of meager education. Some of them did not read or write English at all, and the others had only a very limited knowledge of the language and understood only the simplest sentences and terms. Under the circumstances, the arrangement between these two insurance companies and the rights of the insured under both policies should have been carefully explained. This was apparently not done. They were interested in getting the limited benefits under two policies, one the life benefits under the association membership in Guarantee Trust, and the other in the accident insurance features of the Great Northern. The \$3 which they were paying was to be apportioned between the two insurance companies, and the only means the applicants had of determining how that was to be apportioned was by statements and representations made by Griseto. The oral testimony upon this point therefore becomes of considerable importance, and we are not disposed to disturb the court's findings as to the weight of that evidence.

The amended statement of claim under which the cause was tried alleged that Great Northern issued its policy to Maria Passalini September 27, 1933, and that it was to remain in force as long as the weekly premium of two cents was paid in advance by the Guarantee Trust and accepted by the Great Northern and as long as the insured should be a member in good standing of the Guarantee Trust; that insured paid or caused to be paid to the Guarantee Trust a premium of \$1 fer fifty weeks of insurance under the accident policy, which premium the Guarantee Trust was obligated to pay to the Great Northern; that if the Guarantee Trust violated its contract to pay the premium to the Great Northern it became liable to plaintiff for the value of the loss plaintiff thereby sustained, and that if Great Northern received the premium of \$1 from the Guarantee Trust it thereby became liable under its policy. The case was tried upon the theory that the applicant

mother, and in fact all the witmesses and testified in this case to whom policies were sold, were parties of meeger education. Some of them did not reed or write .m dish at all, and the others had only a very limited knowledge of the language and understood only the cimplest sentences and terms. Under the circumstances, the arrangement hetween these two insurance companies and the -stan need one insured under both policies should have been carefully explained. This was apparently not done. They were interested in getting the limited benefits under two policies, one the life benefite under the association memberehip in Guarantee Trust, and the other in the accident incurance features of the Great Morthern. The \$3 which they were paying was to be apportioned butteen the two insurance companies, and the only means the applicants had of determining how that was to be apportioned was by statuments and representations made by Griselo. The oral testimony upon this point therefore becomes of considerable importance, and we are not disposed to disturb the court's findings as to the weight of that sydence.

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paid \$1 to Guarantee Trust as coverage for one year's premium in advance on the Great Northern policy, and that if Guarantee Trust turned this sum over to Great Northern, then of course the latter would be liable under the terms of its policy because the assured died from an automobile accident within one year; that if the \$1 premium which was collected by Guarantee Trust was not turned over by Great Northern then Guarantee Trust would be liable in damages for the benefits of the policy. It developed, however, in the course of the trial that Guarantee Trust acted as agent for Great Northern in selling its policies, and that Griseto as the representative of Guarantee Trust also became the agent of Great Northern. After all the proofs had been closed and arguments made, a colloquy ensued bewteen the court and counsel from which it became apparent that the court took the view that the secret arrangement between these two companies comstituted a fraud on the applicant; that one company acted as agent for the other, and that representations made by its solicitor were binding upon both companies; and that both companies ought to be held liable. the Guarantee Trust for breaching its agreement with insured in not turning over to the Great Northern sufficient money to keep the accident policy in force for one year, and the Great Northern, who issued the policy, on the ground of estoppel because it had constituted the Guarantee Trust as its agent to sell its policies upon representations which the court found Griseto made to the applicant. Therefore, before judgment was entered the court allowed plaintiff to amend her statement of claim so as to introduce the theory of agency into the proceedings. Defendants argue that this constituted error, because the case had been tried upon the theory stated in the pleadings and plaintiff was allowed to inject an entirely new theory into the case after all proofs had been closed and arguments made, and they say that even in a fourth class action in the municipal court a party is limited in his evidence to the claim he has made, and cannot make one claim

paid \$1 to Guarentee Trust as coverage for one year's premium in advance on the Great Morthern policy, and that it Guarantee Trust truned this sum over to Great Korthern, then of course the latter the terms of its policy because the actured would be liable under the terms of its policy because the actured field from an entomoldic socident within one year; that if the ^1 permium which was callected by anarantee frust west no, turned over by Great Morthern then Guarantee Trust would be liable in damages for the benefits of the policy. It developed, however, in the course of the trial that Guarantee Trust acted as excut for areat forthern in selling its policies, and that Grische at the representative in grantee Trust also became the event of Great Morthern. After all the proofs had been closed and arguments made, a colleguy on use bewteen the court and counsel from which it become apparent that the secret arrangement between these two companies contact are view that the secret arrangement between these two companies contacts at the secret arrangement between these two companies contacts.

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are had been tried upon the theory stated in the plending and plainiff was allowed to inject an entirely new proper into the rese witer ill proofs had been closed and arguments under and they say that even

of claim in his statement and recover upon proof of another. trend of decisions does not sustain this contention. The amended statement of claim as finally amended merely conformed with the proof, and the court permitted recovery under the last amended statement of claim upon evidence of agency which was already contained in the record. Much of this evidence was brought into the case by defendants. When the statement of claim was filed plaintiff evidently did not know of the arrangement between these two insurance companies, and it was only after the proof disclosed their relationship that the theory of agency was made applicable to the issues in the case. Rule 125 of the Municipal court rules provides that "the court may, at any stage of the proceedings, allow any party to smend his pleadings in such manner and upon such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real questions and controversies between the parties. * * ** Chapter 37, sec. 434. Illinois State Bar Association Statutes, 1935, provides that as applicable to the Municipal court of Chicago "amendments to statements of claim * * * filed by either party, may, in the discretion of the court, be allowed at any time." Humerous cases are cited in plaintiff's brief to sustain the authority of the municipal court to permit such amendments, among them being Walsh v. Fallis, 266 Ill. App. 341; Union Bank of Chicago v. Metropolitan Life Ins. Co., 266 Ill. App. 345; v. Kornblith, 248 Ill. App. 108, all holding in effect that in the municipal court an action of the fourth class is whatever the evidence makes it, that the pleadings are not controlling, and that the rights of the parties are dependent upon the evidence adduced at the trial. We therefore hold that the municipal court did not err in allowing the amendment to be filed to conform with the proofs made.

It is next urged that plaintiff did not comply with the terms of the policy by showing that insured came to her death in a

of claim . and on, to he is most revesed bus beeneded all it trand of desistans deep not players in a particular. The same is the at atomore of claim as minolity amongs and are to conform of proof, and the court permitted people warr and his account -not is only sev Holds yours to sensitive most while to incommise and our designed and appropriate while to dealer tained in the renord. Tilitalia billi men migic of competat the chief men illigation of state in inches evidently did not know out to many between bit of the his vienties wind best: it there and white wine at the configuration some relationship that the theory of opensy was ande synthetic to the controls to the larger Lawlerian and to the said and all al someth that "the court may at the greet clare, allow any watty od yer an arrest done made been tropens dema at antibute ald bress of Tol vienseen, of the on obon of little excessore done its bee tank aniz-oversne the aminime the reet lact animal to sucreme off between the parties. * * ** dimenter FV, sec. 464, idinai. tate Bar Association Statutes, lad by particles that as Aprila. Dis to the " Mi lo 10 atmendate of atmendacia" ogsalett to truce ingicinate accolly of these party and the disconstian of the court, be allowed at any time." Muserous same are cited in pickness; to brief to sustain the enthority of the smalelyst court to permit and mendenter in in incini the ada . Ill ob this v delli or inion and and or Chisago v. Wetrocolitem hife that the tell, pt. 455; wit mi wit too i mt the low like . Buf . og . Ill 842 . dillored .v ocn ly u. revers. I oris direct est to motive as trues lagislame estibility of the said to a millivious sen on anthrely out sent at wedom We therefore hold that the currenped aut die not ear in ellering the amendment to be itles to exactors it it the proofs takens.

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manner and under circumstances showing that the less was covered by the policy in question and to show that proof of less was given to the defendants as required by the provisions of the policy. On the back of the Great Morthern policy is contained the following notation:

"In case of accidental injury, fatal or otherwise, notice, as required by this policy including date, place and other details of the accident, may be given to GUARANTEE THUST MUTUAL

who will furnish all assistance required in presenting a claim." It is conceded that August 27, 1934, four days after the death of Maria Passalini, plaintiff went to the offices of the Guarantee Trust in compliance with the notation on the back of the Great Morthern policy, and specifically notified them of her mother's death. She testified that she spoke to Mr. Grisete and told him of the accident and asked him what to do. He advised her to obtain a death certificate and bring it to the office. She then spoke to Mr. Holson, president of the Cuarantee Trust and also commissioned by the Great Merthern to countersism all the Great Morthern accident policies. in order to make them effective. Holson, according to his testimony. says that he told her the life insurance policy was in force but that her accident policy had lapsed; in other words, that liability under the life insurance policy was admitted, but liability under the accident policy was denied, because, as Holson stated, it had lapsed. It is clear from the record that under the arrangement between these two insurance companies Holson was a commissioned agent of the Great Northern, and his statement to plaintiff that liability under that policy would be denied upon the sole ground that the policy had lapsed for nonpayment of the premium, excused plaintiff from furnishing proofs of loss. The authorities so hold. German Fire Insurance V. Gueck, 130 Ill. 345, holds that "proof of loss under a policy of insurance is waived when the company places its refusal to pay solely on the ground that the insured had no title or insurable interest in the

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ground that the insured had no sitis or incursite interest in the

property destroyed."

In <u>Continental Life Insurance Co. v. Rogers</u>, 119 III. 474, it was held to be the settled rule that where an insurance company, after a loss has occurred, places its refusal to pay upon some ground not affecting the merits of the case, as, for instance, want of proper notice, all other formal objections not then complained of or pointed out will be regarded as waived.

In <u>Hanon</u> v. <u>Kansas City Life Insurance Co</u>, 269 Ill. App.

135, at p. 151, the court aptly said that "appellant denied any liability under the policy on the sole ground that the policy had lapsed at the time of the death of the insured. This made it unnecessary to furnish any proofs of death." <u>James v. National Life</u> & Accident Ins. Co., 265 Ill. App. 436, is to the same effect.

Guarantee Trust relies principally upon the doctrine of law that a contract of insurance outside the object of the creation of the society and beyond the powers conferred upon it by its charter, bylaws, and the state of its creation, is void as being ultra vires. The burden of proving this defense is always upon the party relying thereon. Under the statute governing the formation of associations similar to Guarantee Trust, the association is authorized "to make and enforce contracts in relation to the business of their association." Directors are authorized to fix fees to be charged applicant for membership, and all or any portion of the amount of such fees may be paid to any person or persons soliciting the applicant to become a member. Thus the right to solicit members and to pay solicitors is expressly conferred by statute, and it would seem to follow that the right to solicit new members carries with it the right to advertise and to promote a campaign for new members. Undoubtedly the arrangement between Guarantee Trust and Great Northern, by which the former distributed the latter's accident policies, was part of a promotional campaign to increase its membership. Guarantes Trust

property destroyed."

In Continental Life Insurance Co. v. acegers, li 191. 174, it was held to be the settled rule that where an incurance occurry, after a loss has occurred, all see its refusal to pay upon one ground not affecting the merits of the occur, so, for in the act of proper notice, all other formal objections not then see lend of

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promotional campaign to increase its membership. Garantee Turt

did not issue the accident policy. It merely acted as agent for the Great Northern in distributing the latter's accident policy, and this we think it had the right to do. Moreover, the contract for insurance in this case was fully performed by applicant, who contracted with the insurance company, and both companies received the benefits from the contract. In that situation there is abundant authority holding that the company cannot invoke the doctrine of ultra vires to defeat an action brought against it on/performed contract. Will County Nat. Bank v. Champaign County Mutual Relief Ass'n, 259 Ill. App. 201; Bloomington Mutual Benefit Ass'n v. Blue, 120 Ill. 121; Peoria Life Ins. Co. v. International Life & Annuity Co., 246 Ill. App. 38. After soliciting and receiving the advance premiums to be paid to the Great Northern, Guarantee Trust is not in a position to claim that it had no right to distribute the policies. It reaped the benefits of the transaction and should not be heard to breach the contract by interposing the defense of ultra vires.

Finding no convincing reason for reversal the judgment of the municipal court is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur-

and this we think it med the right to do. Hereavel, and ventured for insurance in this area were utile or negleck by a locat, and contracted with the insurance occurry, and coth amount its from the constract. In the tollowing that the constract, and involve the constract of the tollowing that the occurry and involve the constract. It is defeat an autition have in the contract. It is defeat an autition have in the contract. It is a series in the contract of the transaction of the tenance in the contract of the transaction to obtain the the transaction can be involved in the contract of the transaction are the denerated by interpolant the contract of the transaction are the contract by interpolant the contract of the transaction are the contract by interpolant the contract of the transaction are the contract by interpolant the contract of the transaction of the contract of the contra

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allivan, P. J., and comlan, ... concur.

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PEOPLE OF THE STATE OF ILLINOIS ex rel. Oscar Nelson, Auditor of Public Accounts of the State of Illinois,

Plaintiff below,

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EQUITABLE TRUST COMPANY OF CHICAGO, a corporation,

Defendant below.

FIRST NATIONAL BANK OF CHICAGO, successor by consolidation to First Union Trust & Savings Bank as trustee, and GARABED T. PUSHMAN, intervening petitioners, Appellants,

T.

WILLIAM E. O'CONNELL, as successor receiver of Equitable Trust Company of Chicago, a corporation, respondent below,

Appellee.

287 I.A. 619²

APPEAL FROM CIRCUIT

COURT, COOK COUNTY.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The First National Bank of Chicago, successor by consolidation to First Union Trust & Savings Bank as trustee, and Garabed T. Pushman, as interveners, have prosecuted this appeal from two orders entered by the Circuit court of Cook county in a bank liquidation proceeding based upon two intervening petitions, answers thereto filed by the receiver of Equitable Trust Company, William L. O'Connell, who succeeded William J. Maresh, and evidence adduced before the chancellor.

The auditor of Public accounts appointed Maresh as receiver December 7, 1931, and thereafter, December 31, 1931, filed his Mill

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a corporation,

SHOWLLI TO STATE SET TO BISOST ex rel. Oscar Helson, Auditor of Public Accounts of the State of

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FIRST NATIONAL BANK OF CHICAGO, successor by consolidation to

First Union Trust & Savings Bank

intervening petitioners,

Plaintiff bolow,

Defendant below.

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EQUITABLE THUST COMPANY OF CHICAGO.
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COURT J (N. CATTER)
                           as trustee, and CARABED T. PURHMAN,
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WILLIAM L. O'COMMULL, as successor receiver of Equitable Trust Company of Chicago, a corporation, respondent belows AppellegaA

MR. JUSTIC FRICAR L'ARVEL A THE BERLE L'EL BOUTC.

before the Union Frue & Salve and as the of moint T. Julman, so intervenirs, have prosented lile . end at a the orders entered by the Circuit court of cook can by in a bank liquidation proceeding based upon two intervening patients, andwers therete filed by the receiver of touttule out tempony, illian L. O'Connell, who succeeded :illiam J. Marech, on wilones

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adduced before the chanceller.

The auditor of public accounts appoints arother receiver

December 7, 1931, and thereafter, Meanmber al, 1931, filed his hill

for dissolution of the bank. This appeal involves two separate orders covering different parcels of real estate, one located at 2210-16 South Michigan avenue in Chicago (hereinafter referred to as the North property) and the second parcel located at 2218 South Michigan avenue (hereinafter referred to as the bank building) which immediately adjoins the first parcel on the south.

With reference to the North property, it appears that at the time of the appointment of the receiver Equitable Trust Company held a leasehold estate in this parcel of land for a term of ninetyseven years, commencing March 1, 1912, reserving rents payable in quarterly installments. The trust company was the owner of the building constructed upon this property, and the intervening petitioners at the time of the appointment of the receiver owned the fee and the interests of the lessors. In addition to the rent specified in the lease Equitable Trust Company, as lessee, had undertaken to pay all taxes, charges and assessments, general and special, which might be levied or assessed during the continuance of the lease on the land demised and upon any building erected thereon. The receiver, appointed December 7, 1931, collected rents from the tenents in the building during December of that year and January, 1932, purchased coal for heating the building and paid the salary of the janitor.

January 28, 1932, an order was entered by the circuit court authorizing the receiver to reject the lease relative to the North property. The intervening petitioners sought an order directing the receiver to pay the reasonable rental for the premises from December 7, 1931, to January 28, 1932, and also to have their claim for taxes for the years 1930, 1931 and 1932 allowed as a general claim, but the court denied both prayers and by its order of July, 12, 1935, dismissed the intervening petition. One of the purposes

for dissolution of the bunk. This appeal involves the court of orders covering different parecles of the littets, one located to the 2210-16 South Michigan evenue in Chicago (hereinafted of the resent to as the Morth property) and the recent pareclased to the Relation of the new the bank laiding) which immediately adjoins the view to pareclase on the such.

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January 28, 1932, an order was entered by the observent authorizing the receiver to reject the least relative to the Morch property. The intervening potifician is ought an order cirecting the receiver to pay the resonable rented for the premises white to January 28, 1932, and also so any timest claim for taxes for the years 1930, 1931 and 1952 allowed as a general claim, but the court denied both prayers and by its order of built.

12, 1935, dismissed the intervening petition. The purposes

of this appeal is to reverse the order thus entered.

The intervening petitioner's claim for the reasonable rental for the premises from December 7, 1931, to January 28, 1932, resolves itself into a question of fact whether the receiver occupied the premises during this period. If he did, he would of course be liable for the reasonable rental thereof even though he ultimately rejected the lease (People v. Equitable Trust Co., 277 Ill. App. 570); but the receiver contends that he did not occupy the premises and so testified. Maresh stated that on the day following his appointment an informal conference was had at the bank building which was attended by Pushman, one of the intervening petitioners, and Messrs. Reinwald and Keeley, attorneys for parties in interest. Maresh testified:

"At that conference on December 8, 1931, I stated very definitely that I would not adopt the lease on the North property. I offered to collect the rents if the people brought them into the bank building and to make any disbursements to cover expenses. I was never in the North building. Mr. Pushman and Mr. Reinwald agreed to it at that time. Some rents were paid to my office as receiver by persons and companies occupying the North building. * * * I made some payments for expenses for janitor services and for fuel and supplies. * * * A second meeting had with Mr. Pushman and Mr. Reinwald was on January 13, 1932. I stated that my decision as to the south property depended on the prospects of getting the bank to organize or the fact of getting the bank organized to take over the lease. * * * the janitor managed the north property in December, 1931, and January, 1932. He was not my janitor. He was Pushman's janitor. I advised Mr. Pushman on the 8th day of December that I would not elect to adopt the terms of that lease. I had not seen the lease at that time. * * * From December 7, 1931, to the end of January, 1932, the tenants were bringing their rents into the bank building. They gave it to one of my employees."

Carabed T. Pushman, one of the intervening petitioners, admitted that he had talked to Maresh after he was appointed receiver, but denied that the receiver had signified his intention to reject the lease; denied that he [Pushman] had ever told the receiver to collect rents or to expend money for fuel and janitor services. M. Lester Reinwald likewise testified to conferences with Maresh at which Mr. Keeley and Pushman were present, but did not recall any conversation wherein Maresh had been requested to

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collect rents and pay expenses pending his decision as to whether or not he wished to adopt or reject the lease as receiver. Mr. W. M. Keeley, attorney for the receiver, corroborated Marcah's statement that his plans with reference to the building depended on whether the bank would be reorganized. From this evidence we think the court was justified in finding that the receiver had not taken possession. The receiver's decision was apparently held in abeyance pending the question of the reorganization of the bank. Under the law he had a reasonable time within which to elect whether he would accept or reject the lease. The building had tenants and it was necessary, of course, to supply them with heat and janitor service. It is not unreasonable to suppose that under temporary arrangements with intervening petitioners the receiver was to accept rents from the tenants, give them heat and pay the janitor, pending his decision as to the adoption or rejection of the lease. Evidently Marcah had determined shortly after his appointment that he would not adopt the lease unless a reorganization of the bank could be effected, and we think the court was justified in holding that there was no actual occupancy by the receiver.

The remaining question as to the North property is whether the intervening petitioners should have been allowed a general claim against the estate for 1930, 1931 and 1932 taxes. Under the terms of the written lease Equitable Trust Company was obligated to pay all accrued taxes, which included those for 1930 and 1931. Under ordinary circumstances there would be no question as to the liability of the estate for taxes which had accrued and which had been reserved under the terms of the written lease, but the receiver contends that the taxes were not assessed and levied until after the appointment of the receiver, due to the fact that the entire taxes in Cook county were revalued and reassessed to comply

collect rents and pay expenses pendix bit said to since or not ha wished to adopt or respect the Love or or from M. Keelsy, attermey for the reclars. correborated is "e atateno boar to be mibile with od roper short drive country aid their trem whather the bant would be recorded. I've this wished are think the court was justified in their hat the reserver has not ni bled viras. . . . w maters - to-viscon will . notenesson notet abeyande ponding the question of the reary Martin o or bridge Water the law he had a renegative with a which he less the ther he wealth accept on reject the leaves. The latter of it was necessary, of course, to a .p. 1, were it it i with V milet J is bhy fill soo and of aldensessanu sen ei il assivas arrancements with intervening activity of the ter iver to accord rents from the tenants, give then her tand or the delice, punling his dealston as to the adoption or vajoction of the leave. Wid atly place of this appendence all rethe vitted; boningeteb bed decree of blues in a second satisfication as a second sect today ton effected, and we think the court of justifice and the the the court was no actual accupancy by the restives.

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be mreserved under the terms of the ritten lett, such the release and lavied until
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ester the appointment of the vectorer, on its the fact that

with the rules of the state tax commission. However, the evidence offered by intervening petitioners shows the tax levies were all passed and filed for the year 1930 prior to December 31, 1931, and that all tax levies for the year 1931 were passed prior to December 8, 1931 and filed before May, 1932. The receivership estate has not been closed and is still pending. Under these circumstances the receiver who stepped into the shoes of the lessee became liable for the taxes in accordance with the terms of the lease. Illinois Surety Co., 298 Ill. 101, a receiver was appointed for the defendant/company based on a bill for dissolution of the corporation. Three claims were filed by the State of Ohio, which were not ascertainable at the time the receiver was appointed. Notwithstanding this fact the court held that the rights of the State of Ohio existed at the time the receiver was appointed, and the mere fact that the extent of the obligation was not then determinable could not, in reason, defeat the obligation itself. The 1930 and 1931 taxes were provable claims, and we believe the court should have allowed them to be filed even though the amount thereof was not ascertainable at the time the receiver was appointed. Taxes for 1932 had not been levied and we think, therefore, the court properly refused to have them allowed as a claim against the estate.

South Michigan avenue are as follows: In January, 1910, Pushman, one of the intervening petitioners, as lessor, and Landon C. Rose, as lessee, entered into a written lease whereby the premises were demised to Rose for a term of 99 years ending February 28, 2009.

The lease provides that the rentals therein stipulated be paid quarterly in advance and that the lessee shall "pay all taxes, charges or assessments, general or special, which may be levied or assessed against said property." November 29, 1910, the said Landon C. Rose sold, assigned and conveyed unto Michigan Avenue Trust Company the

. TO FEET WITH with the rules of the state tex commission. te. n.14 th three your density when the ter the term of the passed and filed for the year 1930 prior to Sections 31, 10.1, and granges of morro pesses eres 1881 reas and rol seivel as ils int 8, 1931 and filed before May, 1932. The receivership cat to has met end eronatamente etatina, Under these circumstances end requirer who steeped into the above of the leased became liable for the taxes in accordance with the terms of the 1 and, . T BUSVA HI rol hadrian a see revi sa rec 101, 101, 300 c.co year a simill surety the defendent/company based on a hill for dissolution of the derporation. Three claims were filed by the tate of his, which tere not accordinable at the time the red iver was a rinter. Notwithto east out to court that that that the cities of the tate of Onio existed at the time the receiver we appliated, and the more fact that the extent of the obligation was not that terminable seald not, in reason, defeat the oblimition itself. "The 1950 a complete in the left and the complete in the left and the complete in the left and the complete in the complet E - "Lucha THE O DEL 1931 taxes were proveble claims, and as bolt ve den se. toansky allowed them to be filed even though by Talles for 1982 certainable at the time the receiv r were (plinted. had not been levied and we think, therefor , the court corely refused to have them allowed as a claim again a the eat ta.

The facts relative to the bunk william low to 1233 south dichigan avenue are as follows: In January, 1310, whaten, one of the intervening perisioner, on less or, and "endon 0...om, as lessed, entered into a written lease whereby the product of the femial to Rose for a time of 's' years entine "thru y as, "the lease provides that the restals therein etipalsted be poid quarterly in advance and that the lesses that "pay als takes, sharpes or assessments, general or as o'd, which are in class of as o'de as o'de against seld property." Advender m., 1.10, the call seminar of the conveyed unto withingen years for a company the sold, assigned and conveyed unto withingen years for rese company the

unexpired estate for years in and to said property, and said Michigan Avenue Trust Company agreed in writing to accept and assume all the terms, covenants and agreements contained in said lease. In February, 1923, Pushman conveyed to Union Trust Company. as trustee, the property described in the lease, and later the Michigan Avenue Trust Company sold, assigned and conveyed to the Equitable Trust Company the unexpired estate for years in and to the property, Equitable Trust Company agreeing in writing to accept and assume all the terms, covenants and agreements contained in the lease. The property was improved with a bank building owned and occupied by the Equitable Trust Company until the appointment of the receiver for the bank. December 7, 1931, Maresh, as receiver, took possession of the property and he and the successor receiver thereafter continued in possession. As to this parcel the intervening petitioners likewise claim that the estate was liable for general taxes for the years 1930, 1931 and 1932. The receiver makes the same contention with reference to the claim as was interposed on the other parcel of land, namely, that the taxes were not ascertainable and could not therefore be allowed as a general claim. What we have said with reference to the claim for taxes on the North property is likewise applicable to this parcel of It follows therefore that, in our opinion, the court should have allowed the intervening petition as to 1930 and 1931 taxes.

For the reasons stated, the order of the circuit court relative to the North building is affirmed in so far as it denied the claim of intervening petitioners against the receiver for the reasonable rental of the premises from December 7, 1931, to January 28, 1932, but is reversed as to the balance of the order and the cause remended with directions that the court allow the intervening petitioners to file their claim for 1930 and 1931 taxes as a general

unexpired estate for years in emd to said proceedy, and id Michigan Avenue Trust Company agreed in within to accept and assume all the terms, covenants and a reasonts centified in aid lease. In February, 1923, Pushman conveyed to Taion Prant Sime and as trustee, the property described in the lease, and latur the Michigan Avenue Truet Company sold, assigned and conveyed Equitable Trust Company the unexpired estate for years in and to the property, Equitable Tiust Company agreeing in writing to accept and assume all the terms, devenants and agreements contained in the lease. The property was improved with a bank baildin, owned and ecounted by the Equitable Trust Company until the appointment of the receiver for the bank. December 7, 1931, warenb, as receiver, took possession of the property and he and the whorsear theirer thereafter continued in monsession. as to this mercal the intervening peritioners likewise claim that the esters was liable for general taxes for the years 1950, 1952 and 1950. The receiver makes the same contention with reference to the claim as wes interposed on the other pares of lane, news, that the terms were not ascertainable and could not therefore be allosed as a seneral coant to hand what we have said with reference to the oldin lor teres on the Morth property is likewise applicable to this parcel of land. It follows therefore that, in our opinion, the court chould have allowed the intervening petition as to 1930 and 1931 taxes.

For the reasons stated, the order of the elevit court relative to the North building is effirmed in to far as it denied the claim of intervening petitioners against the reliver for the reasonable rental of the premises from secomber 7, 1951, o January 28, 1932, but is reversed as to the balance of the order and the cause remanded with directions that the court floo the intervening petitioners to file their claim for 1950 and 1051 takes as a general

claim against the estate.

The order relating to the intervening petition on the bank building is reversed and the cause remanded with directions that the intervening petitioners be allowed to file their claim for 1930 and 1931 taxes, as well as the special assessment, as general claims against the estate.

DECREE AFFIRMED IN PART AND REVERSED IN PART AND CAUSE REMANDED WITH DIRECTIONS.

Sullivan, P. J., and Scanlan, J., concur-

claim against the estate.

The order relating to the interval and action on the bank building is reversed one the cluic remands with the option that the intervening peristance is allowed to the life built cluim for 1930 and 1931 taxes, we well up the special aspecial aspect, or general claims orgains that catety.

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Sullivan, P. J., and Jounnam, J., senous.

38681

WALTER KROLCZYK, Appellee,

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HERITAGE COAL COMPANY, Appellant.

J. T. James

APPEAL FROM SUPERIOR COURT,

287 I.A. 619°

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action on the case for personal injuries received in an automobile accident. Trial was had by jury, resulting in a verdict for plaintiff of \$25,000. Defendant's motions for judgment non obstante veredicto and for a new trial were overruled, judgment was entered on the verdict and this appeal followed.

The accident occurred on the afternoon of February 15, 1934. Plaintiff, then forty-three years of age, stepped from an eastbound 22nd street car at Throop street in Chicago. When the car stopped on the west side of Throop street plaintiff got off at the front end of the car and stood to the south and front end thereof. Some four or five passengers got off at the same time. Plaintiff had intended to board a southbound Throop street car coming from 21st street about the same time and, as he stood waiting for the eastbound 22nd street car to pass in front of him before starting across 22nd street, the southbound Throop street car was approaching 22nd street along Throop street. According to plaintiff's testimony he started to cross 22nd street toward the north, looked in all directions and did not see any automobiles in the street at that time. However, defendant's automobiles in the street at that time. However, defendant's automobiles in the street at that time.

38681

WALTER KROLDSYK, Appellee,

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HERITAGE COAL COMPANY,

APPEAL PROM APPEAROR TOURT

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mobile, which was proceeding in a westerly direction on 22nd street. must have been some distance east of Throop street at the time, but plaintiff's view of it was obstructed by the street car proceeding east on 22nd street. Plaintiff and several other men walked north on the west crosswalk. According to the evidence defendant's truck actually passed the eastbound street car at a point just east of Throop street and struck plaintiff just as he was about to cross the westbound street car track. Plaintiff was thrown in the air, landed on the hood of the truck, was carried some 100 feet to the west before defendant's truck came to a stop, and was severely injured. Defendant's driver claimed that he did not see the plaintiff until the accident happened, that as he passed the front end of the eastbound street car on the west side of Throop street it started to move east, that plaintiff stepped from behind the eastbound street car into the path of his truck, and that his truck was stopped within a few feet after the impact.

It is first urged that plaintiff was guilty of contributory negligence as a matter of law. It is argued that when there is no dispute as to the facts and when all reasonable minds will agree that upon a consideration of the facts the plaintiff's own lack of care contributed to the injury received, then the question of contributory negligence becomes one of law. In determining whether this case comes within that rule it becomes necessary to examine the evidence presented to the jury. A portion of plaintiff's testimony on direct examination is as follows:

"When I got off the street car I was standing, and the street car passed on east. When the street car went east I walked across. Before I started across the street car was about the other side of the Throop street car line. As I started across I looked around, saw nothing coming north; then I started to cross. I looked east and west. I did not see any automobiles in the street at that time. I did not see any street cars in the street at that time. When I started walking north I was standing on the west crosswalk. I was walking at a slow walk. I did not at that time see any automobiles

a few feet . Iter the impact.

mobile, which was proceeding in a westerly directs on on Sa. treet, must have been some distance wast of "Troop atreet at the fire, but plaintiff's view of it was ob tructed by the etreet or proceding east on 22nd street. Plaintiff and noveral of or men welked north on the west erosewalk. According to the refrance defendant's truck sotually passed the castbound after toar of a mind is toom to Throop street and struck plaintiff for the lic and thous to order the westbound street car track. Plaintiff was correct in h. a. r. landed on the hood of the truck, see carried come 100 fort to the -mi ylurov a auto bid. plota a of amao dourt a'trabralab arolad taaw . berut Defendant's driver claimed that the all see the state of until the accident happened, that we he pashed the Iron, and of the eastbound street car on the west side of Indoop street it trib move east, that plaintiff stopped from behind the continues stre t nation of his truck, and in it is a compared to the good of the

It is first urged that plaintiff so smiley of contributory negligence as a matter of lew. It is ergued that then sield in a dispute as to the facts and when all reasonable mind will expect that upon a consideration of the facts the plaintiffs our lock of care contributed to the injury received, then the question of can refligence becomes one of law. In determining whether this case comes within that rule it becomes a secondary to examine the evidence presented to the jury. A portion of plain iff a testimony on direct examination is as follows:

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coming, did not hear any horns blow or any sounds of any kind of an automobile. I remember when I started to cross the street North, then I don't know know nothing about it. I don't know whether anything hit me."

On cross-examination plaintiff testified:

"While I stood there and before the street car that I had just got off from had moved on I looked to the east. * * * I looked to the west back of the street car and did not see anything coming. I could see about a block or two. There was no traffic, no automobiles or any other street cars coming west on 22nd street. I looked to the east in which direction the street car I got off from was going. I looked to the east about two or three blocks and in that two or three blocks I did not see any automobiles coming toward me. * * * I stood there and the street car moved on past me. I stood still out there in the center of 22nd street on the west side of Throop street and stood there until the street car went on east. The street car passed to the east side of the Throop street car line, went across the street car tracks when I started to walk slowly north across on the west side of Throop street. I wasn't in a hurry because I had plenty of time. * * * After the eastbound 22nd Street car had got by me I looked to the east again. I walked across the east bound car tracks first and I walked onto the westbound 22nd street car tracks. * * * When I looked to the east I was still standing, after the street car had gone past me and got over past the street car tracks of Throop I started across. Before I started across I looked again to the east. * * * Well, I remember when I started, to begin to start walking I looked around and then after I don't know what was happened."

Marion Swiontnicki, who was on the front platform of the southbound Throop street car at the time of the accident, testified on behalf of plaintiff, stating that he saw defendant's truck coming east of Throop street on 22nd street -

"speeding about the rate of thirty-five or forty or better. It was hugging the right, north side rail. When I first saw it I judge it was about three or four hundred feet east of Throop street. There were no other automobiles going east at that time. I saw a 22nd street car passing east on 22nd. It was crossing east before our car came to a stop. * * * At the time I noticed the Ford truck three or four hundred feet to the east, the 22nd street car was crossing in front of me rattling across the Throop street rails, going about ten miles an hour. * * * I watched the Ford. Eventually the Ford car down a block away and the street car came alongside of each other and passed each other about twenty-five feet east. * * * When the man got hit by the Ford he was walking slowly. The two other men were walking behind him about three feet. The Ford came along still straddling the west-bound rail, did not swerve to the right or left, going straight along at forty miles an hour."

Joseph Stark, a resident of Pierce, Idaho, was brought here to testify on behalf of plaintiff. He had been a passenger on the eastbound street car with plaintiff, and had alighted from the front

coming, did not how any horns blos or my sunce of the kindle and appearable. I remember when I test to a case, the track Borth, then I den't knew herhing about it. I den't knew whether apphance in this me."

On cross-examination plaintiff testified:

I done to a court and profession and broad a find had just got of iron had moved an looker to in again, and I looked to the west back on the street are and id no bedool I anything coming. I could see about a of each of two. That a describe, ne automobiles or any oid a sease the confidence of no realic, no automobiles or any other street death coming one to on End atrect. I looked be the case in the tell discount of the area to or three blocks and in that two or three blocks i dis no or any automobiles coming toward me. * * ' i stood there and the street on moved on past me. I stood still subther. In the street on the west nide of direct and the tell of the street on the west nide of direct as the tood to the treet on the west nide of direct or past of the street on the west nide of direct or past of the street of th the east side of the Throop atreet can line, went acrose the street day tracks when I started to walk closky north erors on "I week to windig bed I someose warm s at theew I .toorta goodf to obis time. * * * After the eastbound 20mo treet ese bud , ot by me I leoked to the east again. I walked seroes the fact bound our resert to to the first bout the westbound first to and in the term Than I looked to the east I was sill trans. I'ter the 并 斧 声 street car had gone part me and got over their she throt lar trains of Throng I started across. Wefore I courted across I icaked again to the east. * * * | ell, I remember when I strated, to be, in to start welking I looked around and then after a don't know . And . was happened."

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Joseph stark, a relident of leros, jours, at him a lare

to testify on behalf of plaintiff. To med post a passet, in it cast thound street our with plain it., and and alaghree arm and are already

end of the car with plaintiff, intending to take the southbound Throop street car. He also waited with plaintiff for the eastbound car to go by, and after the car had proceeded east he walked about three or four feet behind plaintiff in a northerly direction on the crosswalk. Stark evidently had the same means of observation as did plaintiff. He testified as follows:

"The street car had gotten about seventy-five or a hundred feet east before Krolczyk started to go north across the street car tracks. Krolczyk was about on the rail of the westbound tracks. When I started across I looked east. I seen the street car that passed and went down east. There was no automobiles there. Krolczyk was walking a natural gait and I was walking behind him. The first that I saw the westbound automobile that struck Krolczyk was when it was about to strike him. I jumped back when he was about to strike him because he didn't blow no horn. I was about to be struck and I moved back. The automobile was going about thirty-five or forty miles an hour. * * * The automobile stopped about a hundred feet west of the crosswalk where Mr. Krolczyk was struck."

On cross-examination Stark testified as follows:

"The street car that we got off from moved on clear across Throop street and went on its way east. After the 22nd street car passed up, Krolezyk moved to the north across 22nd street. I was the next one. At that time the 22nd street car had gone on about a hundred feet or more past Throop street east. It was way across Throop street and was on down the line. As I started to walk across I looked to the east."

Casimir Ulanski, who was riding on the southbound Throop street car, testified that defendant's truck was proceeding in a westerly direction across Throop street at the rate of about 35 or 40 miles an hour. Chester Moony, another passenger on this same car, testified that he had been driving automobiles for about six years and judged the speed of defendant's truck as between 35 and 40 miles an hour.

Plaintiff's case was tried on the theory that he did everything that a vigilant man could have done under the circumstances to look out for danger; that instead of crossing the street car track in front of the car from which he had alighted he carefully waited until the street car had passed before him, although he saw the car he intended to take approaching 22nd street from the north;

end of the car with plaintiff, intending to the the the of low to decorate throop street car. We also twitted with a invale of a low to dear to go by, and after the par had proported the the last left in a northeady circustant three or four feet bohing of the iff in a northeady circustant crosswalk. Thank evid ntly had the orman of a bert then added plaintiff. He testified at those t

"The street car had justed about sev ity-live or a initity and leet east before krolesys starte to so north source wheeters car tracks. Krolesys was about an the rail of the westbound tracks. About I started scroom i looked cart. I sam the street and tracks that said went down east. There was no intended that start, asking a natural gait and I saw salking a caino him. The street that is an the westbound automotic that secuel Krolosys was about to strike him. I jumped bear and it was shout to strike him. I jumped bear and it was bout to be stunck and I may be seen and I him because he didn't blow no horn. I was bout to be stunck and I moved back. The automobile was oiny about a hinty-live or forty moved back. The automobile was oiny about a hundred feet was bour. ** ** The automobile stored about a hundred feet west of the crosswalk where it. Krolosyk was 'inch."

On cross-examination black teneffice as 1 732 over:

"The street can that we got off from move on that another the ERNd street our Throop street and sent on its way nort. Ifter the ERNd street our passed up, Krolczyk m vee to the north term. Indestruct on the time the ERNd attect out has built on bout hundred feet or more past. Throop street and was on down the line. It started to the east."

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to go by he looked to the east and before starting to walk north he again looked to the east and the west and saw nothing coming; that he walked slowly north until he was struck. His testimony is corroborated by that of other witnesses who stated that defendant's truck was proceeding west at a high rate of speed over an intersection of street oar tracks without sounding any warning, and that the accident was caused through the negligence of defendant's driver and in spite of the caution exercised by plaintiff. From the picture drawn by plaintiff's witnesses it is probable that the eastbound street car from which plaintiff had alighted obscured the view of defendant's truck, because Stark, who was in approximately the same position as plaintiff, stated that he also looked to the east and saw no automobile approaching.

Defendant sought to show by its witnesses that plaintiff was guilty of contributory negligence. One Whittington testified on behalf of defendant that he had been driving an automobile in a westerly direction following defendant's truck at a distance of about 20 or 30 feet; that

"The street car and Ralph Heritage passed each other just west of the crossing of Throop. * * * I saw the Heritage car passing the street car and I saw a body strike the front end of the hood of the car and the left front fender. That person came approximately from nowhere. He was at the back end of the street car. * * * As the Heritage truck was crossing the west crosswalk of Throop street it was going probably ten or twelve miles an hour. * * * I crossed over Throop street about five miles an hour and that's the same speed the Ford truck was going approximately. I kept thirty feet behind it. The 22nd street eastbound street car was stopped. I did not see any passengers getting on or off at any time. * * * At the time the rear end of the eastbound street car got to the west crosswalk the Ford truck had already stopped about sixty feet west of the Throop street crossing."

It was shown, however, that on the day of the accident Whittington made the following statement to the police:

"I was driving west on 22nd street and there was Ford car ahead of me, about 125 to 150 yards ahead, going west also, when this Ford car passed the Throop street intersection I heard the screech of brakes, and somebody holler, then the car stopped, then that as he and other men there were starving the entirous car to go by he looked to the east and before starving to walk north he again looked to the east and the west and saw nothing coming; that he walked alowly north until he was atruck. His testimony is corroborated by that of other witnesses who stated that defendant's truck was proceeding west at a high rate of appeal over an intersection of other tracks without counding any coming, and that the accident was caused through the negligence of defendant' driver and in spite of the caution exercised by plaintiff. From the picture drawn by plaintiff's witnesses it is probable that the easthound street car from which plaintiff hed alighted obsqueed the view of defendant's truck, because Stark, who was in as rowinstely the sense position as plaintiff, of steed that as also looked to the east and position as plaintiff, of steed that as also looked to the east and

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Subsequently, on February 23, 1934, Whittington also signed the following written statement:

"There had been an eastbound street car at the intersection but had pulled out and gone east before I reached the intersection

or just as I was pulling up to the intersection. * * *

As I reached the intersection I could see an accident had happened and I heard brakes screech and a man scream or somebody scream. I saw this Ford truck ahead of me come to a stop; and I saw a body in the street ahead of the car.

I had been about one hundred yards to the rear of this car

I had been about one hundred yards to the rear of this car most of the time since the car had passed me and it had been riding

on the westbound street car track. * * *

Prior to the accident I did not see any pedestrians in the street at all at any time and I did not see the Ford truck strike Mr. Krolczyk. I did not see him before he was struck and afterwards until the Ford car stopped."

From the foregoing contradictory statements it is apparent that the jury could not have placed much reliance upon the testimony of Whittington.

Ralph Heritage, who drove defendant's truck, testified as follows:

"As I came up to Throop street I saw a street car standing still on the southwest corner. At that time I was just coming up to Throop street. I slackened down to around five or eight miles an hour. * * * The street car started up about the time I was at the front end of it. * * * As I got to the rear end of the street car a man seemingly ran in front of me and I swerved and stopped as soon as I could. This man came out from the back end of the street car. * * * The actual accident took place around sixty feet west of the west crosswalk of Throop street on 22nd street. * * * At the time I first saw the plaintiff he came from in back of the street car."

It likewise appears that on the date of the accident Heritage made a written statement to the police of the city of Chicago to the following effect:

"I was driving my Ford car, Illinois license #419-702 year 1933, west on 22nd street, and I had just about passed Throop St. intersection when a man came from behind large red truck going east on 22nd street and dashed out in front of my car and I struck him.

Q. How fast were you driving the car when you hit the man?
A. About 25 or 30 miles an hour.

From the foregoing evidence it is apparent that the questions of negligence and contributory negligence became questions of fact for the jury, and not questions of law as defendant contends. If,

and I was pailing mean the car, I saw a cun lying in the street. * Subsequently, on February 25, 1954, hittington clso si med the

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following . ritten statement:

"There had been an earthound attest our at the intersection but had pulled out and gone east before I reached the intersection or just as I was pulling up to the intersection. * * *

As I reached the intersection I could see an accident har happened and I heard brakes serouch and a man serous or comebody seream. I saw this Ford truck ahead of me come to r stops and I saw a body in the atrect ahead of the cor.

I had been about one hundred youds to the rear of this car most of the time since the car had passed me and it had been riding

on the westbound street car track. * * *

Prior to the accident E did not see any percurians in the street at all at any time and I did not see the Tora truck attack at Mr. Krolosyk. I did not see him before he was struck and siterwride until the Ford car stopped."

From the foregoing contradictory statements it is apparent that the jury could not have placed much relighed upon the testinemy of whittington.

Ralph Heritage, who drove fuf adams! truck, testified as

follows:

"As I came up to Throop street I saw a street car standing still on the southwest corner. At that time I was just coming up to Throop street. I slackoned cown to amount iive or eight miles an hour. * * * The street our rearred up bout the time I was at the front end of it. * * * As I got to the rear end of the street car a man sessingly ran in front of me and I swerven and etopped as soon as I could. This was continue the back can exist the street car. * * * The notate accident took lace wound inty feet street car. * * * The notate accident took lace wound inty feet west of the west orosswalk of "hroop street on End street. * * * * At the time I first saw the plaintiff he care from in brok of the street car."

It likewise appears that on the date of the sociaint Veritare made a written statement to the police of the city of Chics o Le the following effect:

"I was driving my Ford car, illinois license M19-7(3 year 1933, west on 25md street, and I had just about passed Throop &t. intersection when a man came from behind large red truck going east and dashed out in front of my one and I attuck him.

W. How fast were you driving the car when you hit the man?

From the lovegoing ovidence it is apparent that the questions of negligence and contributory negligence become questions of fact

for the jury, and not questions of law as defendent contends. If,

as plaintiff and his witnesses stated, he took the precauti on of allowing the eastbound street car to proceed shead of him, looked in both directions and then proceeded cautiously across 22nd street, as the jury evidently believed he did, and that defendant's car, proceeding west on 22nd street at the intersection of two street car lines, and without any warning, passed the eastbound street car at an excessive rate of speed, then the jury was justified in finding as a matter of fact that plaintiff was not guilty of contributory negligence and that the injury was caused by the carelessness of defendant's driver. The jury had a right to take into account the credibility of various witnesses and all the circumstances leading up to and attending the accident. The issues of fact as to whether the accident was caused by defendant's negligence alone, or whether plaintiff by his conduct also contributed to /injury, were squarely placed before the jury and determined adversely to defendant. a careful examination of the record. We believe the case was fairly tried and that the verdict is not at all contrary to the manifest weight of the evidence.

The only other point urged as ground for reversal relates to the admission of evidence relative to the speed of defendant's automobile. Paul Totzke, a witness for plaintiff, was asked to give his opinion as to the speed of defendant's car and testified:

"I would be able to judge the speed of a moving automobile at a distance. I might be able to partly form an opinion as to the speed that automobile was traveling. It wouldn't be safe or sure."

Thereupon the following transpired:

that car? Crowe: That I object to in view of the witness' qualification. It would be purely conjectural and surmise on his part, and he so admits frankly that he couldn't tell.

The Court: Overruled.

A. I should judge about forty miles an hour.

Later in the trial plaintiff's counsel made the following statement to the court:

as plaintiff and his witnesses tates, as took the uncent on of allowing the eastbound street car to proceed these of him, looks, in both directions and then proceeded neutiously seron, which street, as the jury evidently believed he did, and that affect, the our, proceeding west on 23md street at the intersection of the track car lines, and without any a ming, passed the castbom? 1 35 1 :5% at an excessive rate of speed, then have jury as in this in this ing as a matter of fact that plaints. We are they or sensituater negligence and that the infury one caused by the or will be defendant's driver. The jury had a right to tek inte ee cunt the minute of on agreet, wit his the as as mis such as to villettero up to and attending the accident. The intrus of T a to the colour the accident was caused by defendent's neal (nee Landen To a rect plaintiff by his conduct slac contributed to finjury, placed before the jury and determined www.re li to to me of a careful examination of the record, we believe the come our raining tried and that the verdict is not as all come by to the amifest weight of the evidence.

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The only other point urged as ecouse for new meal aclater to the admission of evidence relative so the spend of defendant!

automobile. Faul Totake, a sitness for plainties, the case to the spend of defendents our end to thise!

[&]quot;I would be able to judge the apend of a moving rutemon'l nat a distance. I might be be to partly town in opinion in a second that automobile was troveling. It orlant be and or our."

Thereupon the following transpir dr

that cars are That I object to in view of the poed of qualification. It would be north a north of the solution of the solution

A. I should judge shout forty miles an hear.

Leter in the trial plaintify's counsel and the following thatement

"Mr. Irwin: I read over part of the record of the street car motorman's [Totzke] testimony. Mr. Crowe made objection to the witness testifying as to the speed of the automobile. Your Honor, I will withdraw it. Strike out that question and answer.

The Court: I think you are much more apt to put error in the situation than at the first time."

The record discloses that the testimony of the witness Totzke was thereupon stricken and the court instructed the jury to disregard it. It is argued that this constituted error. Inasmuch as the testimony which was thus stricken was merely cumulative, it would not in our opinion constitute reversible error. It was abundantly shown by other competent evidence that defendant's truck at the time of the occurrence was going 35 to 40 miles an hour, and therefore the stricken testimony could not have affected the verdict of the jury.

The case was fairly tried. No complaint is made as to the instructions or the size of the verdict. In view of our conclusions on the main point of the case, namely, that the question of contributory negligence became one of fact, which was submitted to the jury under proper instructions, and not one of law, and that the verdict is not contrary to the manifest weight of the svidence, the judgment should be affirmed and it is so ordered.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

The record disclose that it is a shown on it if an inverse was thereupon stricken and the sourt in the start, the fully so discognition it. It is again that this one that earth error, the restiment which was thus steady one is savely completer; it would not in our opinion some situse reverse ble armo, all and irror orbits competent durance that and the same is the time of the occurrence was roing a so and the same or the theoretics of the same was roing a so and the same or the theoretics of the fury.

The case was fairly tried. To complete is as . . to the instructions of the sine of the versict. In visual corrections of the main point of the correction, demonstrate and respect to the contributory and representation of fact, about and adversary and representations, and not on the far year of the the contract of th

Sulliven, P. J., and Scenien, J., concur.

38701

PEOPLE OF THE STATE OF ILLINOIS ex rel. BIAGGIO MARTINO, Appellee,

V.

CITY OF BLUE ISLAND et al., Appellants.

4 7

APPEAL FROM SUPERIOR COURT, COCK COUNTY.

287 I.A. 6201

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The City of Blue Island appealed from a judgment order of the superior court entered October 11, 1935, directing that a writ of mandamus issue requiring the city and its officials to reinstate the relator, Biaggio Martino, to his position as an unskilled laborer in the department of public works of the City of Blue Island, to enter his name on the payroll, appropriate moneys, pay relator from June 14, 1933, at the rate of \$540 a year, and by the same order the court also entered judgment against respondents for \$1,200.

The original petition for mandamus was filed February 27, 1934, and a general demurrer thereto was sustained. Thereafter an amended petition was filed April 9, 1934, and a general and special demurrer thereto was likewise sustained. June 25, 1934, a second amended petition was filed. Respondents interposed a general and special demurrer, which was overruled, whereupon respondents elected to stand by their demurrer and the order for mandamus followed.

The second amended petition alleged that the City of
Blue Island had adopted the provisions of "An act to Regulate
Civil Service in Cities," and that the civil service act had been
in effect in Blue Island for some five years; that the relator,

PROPIN OF THE STATE OF LIMITORS ON TELL BLAGGIO MAPTINO, Appelles,

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CITY OF DELLE STRAND OF STRANDS.

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The City of Blue Inland appealed from . In mont order of the superior court entered October 11, 1000, the sains that a writ of mandamus issue requiring the oliginal 15s of loignate to reinstate the relator, Biaggio Martins, so into partition sa unskilled laborer in the department of partition orks of the Oity of Blue Island, to enter into name on the onymoll, appropriate moneys, pay relator from June 14, 1900, the object of the sagainst respondents for the court old contered judgment

The original profition for mandamen was filed P-brunry 27, 1934, and a general deserver thereto was suctioned. Then after an amended petition was filed \pril (, 1834, and a grecial dominter thereto was likewise and thed. Such ined. Such 1934, a record amended petition was filed. Re pendents interpreted a general and special dominter, which was overcal a, whereupon respondents elected to utend by their department of a description and amendames followed.

The second amunded p-tition alloged that the 1'g of Blue Island had adopted the provisions of "An pot to egulate Civil Service in Cities," and that the civil service act had been

Biaggio Martino, was a civil service employee of the city, being an unskilled laborer in the department of public works and classified under "Unskilled Labor - Class F - Grade 1." It was further alleged that in the month of May, 1933, relator was discharged by one Barney Hammond, Superintendent of Public Works, "without cause or charges being preferred against him, said discharge being for political reasons only;" that Martino had performed his duties and is ready, willing and able to continue so to do, but has been refused his position without cause; that the city has provided for said position at the rate of \$540 a year in its annual appropriation bill for the year 1932 and succeeding years; that at a meeting of the civil service commission held June 10, 1933, the commission notified the superintendent of public works to appear before the commission June 14, 1933, relative to the reinstatement of relator; that at said meeting the commission asked the superintendent of public works to state his reasons for discharging relator and why no charges were filed, to which the superintendent replied that he did not know he had to notify the commission and that the relator was discharged on order from an alderman; for political reasons. It is alleged that the commission thereupon ordered the relator to be reinstated to his position, with pay from June 1 to June 15, 1933, "inasmuch as no charges were filed or the Commission notified, and that his discharge was contrary to the Civil Service Laws;" that the superintendent of public works was thereupon notified of the action taken by the commission but has failed to reinstate and employ the relator; that respondents have assigned others to perform the duties of the relator and are paying them the salary which rightfully belongs to him.

It is first urged as ground for reversal that the relator was properly and legally discharged and that the order of reinstatement issued by the commission was unauthorized and void. The right of persons appointed under the civil service act in cities not to be

allowed that in the menth of hely, 1.75, well to: " in riged by one Barney Hammond, uportatemient of leville our , or charges being proferred again thin, the dime being for political reasons only;" that Martine t. d perform the telicotting is ready, willing and able to southness of to for intitude been tellgored his position without cause; that the city how growly for wid nosim tion at the rate of \$550 a year in its annual appropriation 'ill for the year 1932 and succeeding years; wheth a meeth of he sight service commission held tune 10, 1937, the commission midfied the superintendent of pullic works to appear before and; inches and 1933, relative to the mein tot ment of my Discount 1933, relative to the meint of ment of my Discount of the ment meeting the commission thed I e uperintendent of maintain to state his reasons for discharging a dator and right of the ele filed, to which the apportantendent randied that he it in a lane he had to notify the carminaton and that the rightor ending the on order from an aldermen for politic 1 vos. one. It is langual that the commission thereupon ordered the rul ver to be rinks to d to his position, with pay from June 1 to tune h. , its much as no was contrary to the Civil cervice Lawry' of a de that me nt of public works was thereupon notified of the stron taker by the that thos I had while the standard to belief and but no iselamos respondents have assigned others to perterm the entire of the relator and are paying them the salary which it hould, a longs is ite.

Bieggio Martino, was a civil service or love of the city, being an unskilled laborer in the department of jublic orise and oloulatied under "Unskilled Labor - Class ? - Grade 1." The further

was properly and legally discharged and that the order of reinatate-

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discharged except for cause and upon written charges and after an opportunity to be heard in his own defense is based upon section 12 of "An Act to Regulate the Civil Service of Cities," (Illinois State Bar Stats., 1935, chap. 24, sec. 12, par. 697) which contains the following provision:

"Excepting as hereinafter provided in this section, no officer or employee in the classified civil service of any city, who shall have been appointed under said rules and after said examination, shall be removed or discharged except for cause, upon written charges and after an opportunity to be heard in his own defense. Such charges shall be investigated by or before said civil service commission, or by or before some officer or board appointed by said commission, to conduct such investigation. The finding and decision of such commission or investigating officer or board, when approved by said commission, shall be certified to the appointing officer, and shall be forthwith enforced by such officer. Nothing in this act shall limit the power of any officer to suspend a subordinate for a reasonable period, not exceeding thirty days. In the course of an investigation of charges each member of the commission, and of any board so appointed by it, and any officer so appointed shall have the power to administer oaths and shall have power to secure by its subpoens both the attendance and testimony of witnesses, and the production of books and papers relevant to such investigation. Nothing in this section shall be construed to require such charges or investigation in cases of laborers or persons having the custody of public money, for the safe-keeping of which another person has given bonds." (Italics ours.)

By the express provisions of the last sentence of this section the benefits of the act are not extended to laborers or to persons having the custody of public money for the safe-keeping of which another person has given bonds. It is argued that the petition of relator, a common laborer, is based upon the allegation that he was discharged for political reasons and without charges being preferred against him and that under the provisions of section 12 relator could be discharged by his appointing officer without cause and for any reason which the appointing officer deems sufficient, or for no reason.

This section was considered in the case of City of Chicago
v. Southern Surety Co., 239 Ill. App. 628, in relation to the case
of a civil service employee having the custody of public money, and
we there held that the effect of the opinion in People v. Loeffler,
175 Ill. 585, is that -

"As to the manner of appointment in the office of the

discharged except for cause and upon witten ob rade no test an opportunity to be heard in his own defence is has ed upon rest on 12 of "An Act to Regulate the Sivil service of tities," (Illinois State Bar States, 1858, chap. 20, usec. 12, per. 497) which overtains the following provision:

"Excepting as hereins for ereliable of the civil of the civil of any officer or ereliated in the shall have been appointed under artifable. And the residence examination, shall be recoved or disting decrease to be recoved or disting decrease. And the recover of the civil decrease and electer and opportunity to be heared in his own defence. And at reas shall be invocable to be described in before each civil service commission, or the or follow of the civil service commission, the or decrease of the civil or beard appointed by said commission, the order of the civil or finding and decision of such commission or invocable time of feet appointing articles, and shall the civil of crains in, fill a sample of the sappointing of the actual that the civil of a sample period, not accepted by the civil of an investigation of all of the course of an investigation of all of the course of an investigation of all of the sappoint death if he re also power to send the sappoint of the little subposes covil the tenders and the course of the course of the subposes covil the tenders and the course of the course of the subposes covil the tenders and the course of the course of the subposes covil the tenders and the course the course of the subposes and the standard of the course of the subposes and the standard and the course of the subposes and the sappoint of the subposes and the subpose and the subpose and the sappoint of the subpose of the subpose and the sappoint of the subpose of the subpose and the sappoint of the subpose of the subpose and the subpose an

By the express provisions of the 1.5 and not of this section the benefits of the out are not and now to I become the baving the contody of mublic money for the simple of this color, and the person has given bonds. It is eight and the efficient of the relator, a common laborer, is based upon the first thin this has not been sufficient to the first things of the political reasons and tilicular the simple that and that and the province of the color of the color of the him and that appointing of the first the appointing of the first things of the appointing of the court of the the appoint of the court of the court of the the court of the court of

This section we considered in the cold of the of places.

v. boathern surety co., 239 11. ..., the sell tion to the cold of a civil service employed haven, the cultury of a civil service employed haven, the culture of a civil service employed haven.

we there held that the effect of the opinion in 100 de 1. ... of 1. ...

[&]quot;As to the manner of smouthtain in the olide of the

collector, the provisions of Section 22 of the Cities and Villages Act have been modified by the provisions of the Civil Service Act, so that while the City Collector has the power to name his Clerks and Subordinates, he is limited in the naming of them to the persons whose names appear on the Civil Service list. However, as to the removal of any employee for whose fidelity he has been required to give bond, his power is arbitrary and absolute; he can remove such employee at his pleasure."

The proviso of section 12, excluding from the benefits of the act persons having the custody of public money, also excludes "laborers," and under the authority of the Loeffler case and City of Chicago v. Southern Surety Co., supra, the superintendent of public works of Blue Island had arbitrary power to discharge the relator without the right of interference by the civil service commission. The commission in the proceeding in the instant case was attempting to override the statutory authority of the superintendent of public works by setting aside his order of discharge. and under the statute it has no such authority. In the case of laborers employed by cities the only authority which the commission has is to examine applicants for vacancies and to certify for appointment those who meet the requirements, but the commission is devoid of any power to remove or discharge such a laborer after his appointment. The validity and constitutionality of this section was upheld in-the case of People ex rel. Reilly v. City of Chicago, 337 Ill. 100, wherein the Supreme court held that section 12 of the civil service act relating to cities, and excepting laborers from the right of a hearing before they are discharged from any employment, does not violate the due process clause of the state and federal constitutions, inasmuch as a laborer under the statute has no property right in the particular position that he occupies and is not deprived of his right to sell his labor and to receive compensation therefor.

It appears from the minutes of the meeting of the civil service commission, held June 14, 1933, at which the commission ordered Martino reinstated, that the superintendent of public works

collector, the provisions of lection 22 of the Cities and Cillager Act have been accilled by the provisions of the ivil and it.

The base been accilled by the provisions of the action of the collecter and bubordanates, no is limited in the accident of them to the collecter above names appear on the Civil Survice list. However, as to the removal of my exalty or for the citality we had been required to give bond, his power is arbitrary and absolute; he can remove such employee at his pluasure.

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It appears from the minutes of the macing of the civil service domnission, held June 14, 1933, at which the commission ordered Martine reinstated, that the augerintendent of public works

was asked to state the reasons for Martino's discharge and why charges were not preferred against him, to which the superintendant replied that he did not know he was required to notify the commission and that Martine was discharged for political reasons. It appears from the minutes that the commission thereupon ordered the relator. as an unskilled laborer, to be reinstated to his position. "inasmuch as no charges were filed or the commission notified and that his discharge was contrary to the civil service laws." The ground for the reinstatement is thus stated in the minutes of the meeting and appears in the pleadings upon which the cause was determined. Counsel for the relator argues that the allegations of the second amended petition present a new point not heretofore determined in this state. It is conceded, of course, that the appellate court in City of Chicago v. Southern Surety Co., and the Supreme court in People v. Loeffler and People ex rel. Reilly v. City of Chicago, supra, had this provision under consideration in the case of civil service employees who are excluded from the benefits of the provisions of section 12, but it is urged that section 12 imposes three requirements for a valid discharge, namely, (1) cause, (2) written charges, and (3) an opportunity to be heard in his own defense, and that these must coexist in the case of removal of all officers or employees under the classified civil service; that all these requirements are necessary except as the same are modified, with respect to laborers, in the last sentence, which does not, however, exclude that class from the protection offered by the first sentence but merely reduces the number of requirements from three to two; that while the laborer may be removed without written charges, there is no authority under the law for his removal without cause. However, in the instant case the cause of relator's removal was stated by the superintendent of public works, and whether that cause was good or not was immaterial, since under the authority

was saked to state the reasons for kartino's oich of a and ally charges were not preferred against him, to which the creating and replied that he did not know he was required to notify the corribation and that Martino was discharged for political reasons. from the minutes that the commission therevers ordered the relator. as an unskilled laborer, to be reinstated to his position, "inarm: ih as no charges were filed or the commission nething no that his discharge was contrary to the civil service laws." The ground cir the reinstatement is thus stated in the minutes of the meeting oud appears in the pleadings upon which the cause was determined. sel for the relator argues that the allegations of the second amended petition present a new point not here tofore determined in this state. It is conceded, of course, that the appellate court in City of Chicago v. Southern Surety Co., and the Supreme court in Deeple v. Leef ler and Poople on rol. Roilly v. dity of Chicago, depais has this ploweralon under convideration in the case or civil and engloye and are excluded from the benefits of the provilence acteur, but it is urged that a citica li impases three requirements for a vilia discharge, namely, (1) cause, (2) written charge, and (c) an opportunity to be heard in his own defense, and that these mast counse in the case of removal of all officers or appleyees under the classiff of civil service; that all those requirements are necessry except as the same are modified, with respect to laborers, in the lest sentence, which does not, how ver, exclude that class from the protection offered by the first sentence but merely reduces the number of requirements from three to two; that while the 1 borer may be emoved authout written charges, there is no suthority under the 1 w for his removal without dance of owe the instant of the couse of righting removal was stated by the superintenning of public work, and whether that cause was good or not one image since where the ethertty

of <u>City of Chicago</u> v. <u>Southern Surety Co.</u>, <u>supra</u>, the superintendent had the right to remove relator "at his pleasure." It was evidently the intent of the legislature that laborers could be removed for any cause and without written charges being preferred against them or an opportunity to be heard in their own defense, and the courts have given effect to this legislative intent by decisions construing the act and upholding the constitutionality thereof. If the act is bad the remedy lies with the legislature, and not with the courts.

Other grounds are also urged for reversal, including the defense of <u>laches</u>, but in view of the conclusion reached upon the main question in the case we deem it unnecessary to consider them.

For the reasons stated the judgment of the Superior court should be reversed, and it is so ordered.

JUDGMENT REVERSED .

Sullivan, P. J., and Scanlan, J., concur.

of City of Chicago v. Southern Surety Co., supre, the superintendent had the right to remove relator "at his pleasure." It was syldently the intent of the legislature that laborers could be removed for any cause and without written charges being preferred against them or an opportunity to be heard in their own defence, and the courte have given effect to this legislative intent by decisions constraing the act and upholding the constitutionality thereof. If the act is oad the romedy lies with the legislature, and not with the courts.

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For the reasons stated the judgment of the Superior court should be reversed, and it is so ordered.

. TREVIEW TWENDING

Sullivan, P. J., and Scanlan, J., consur.

38711

ANTHONY FORTUNA, administrator of the estate of Agnes Siwula, deceased,

Appellee,

T.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a corporation; Appellant.

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APPEAL FROM MUNICIPAL COURT OF CHICAGO.

287 I.A. 620²

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Anthony Fortuna, as administrator of the estate of Agnes Siwula, deceased, sued to recover on a policy of insurance issued on the life of deceased. Trial was had by jury, resulting in a verdict and judgment for plaintiff for \$500, from which this appeal is taken.

The statement of claim alleges that June 15, 1931, defendant issued its policy for \$500 on the life of Agnes Siwula; that she died April 17, 1932; that the policy was in force on the date of her death and had not been paid.

The affidavit of merits averred among other things that the policy should not take effect "if on the date thereof the insured be not in sound health, but that in such event the premiums paid on such policy be returned." It is also averred that the insured was not in sound health on the date of the policy, but was suffering from cancer; that when the policy was issued the insured was confined in the Gook county hospital and had been there from June 10 to July 3, 1931, suffering from an ailment diagnosed as cancer. It is further alleged in an additional affidavit of merits filed by defendant that the policy of insurance sued upon

ANTHOMY POSSUMA, adminitrator of the care of the cared, deceased,

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THE PRUDENTIAL INSURANCE COMPANY OF AMTICA, a corporation, appealant.

MR. JUDIE TYMAN VAL CHRIPT CITCUL AND

Anthony Fortuna, as administrator of the letter of Smeastwale, deceased, sued to recover on a policy of incurred length on the life of deceased. I and was had by jury, as divine in a verdict and judgment for plaintiff of ,50%, ranguist this appeal is taken.

ant issued its policy for 2000 on the life of the line in the date and died April 17, 1932; that the policy was in cool on the date of her death and had not been paid.

The statement of claim alleger that done I . 17:1. 6 ferd-

The affidavit of merits averred emay of a shings that the policy should not take effect "if on the a to the common the instance be not in sound health, but that is such a such policy be returned." It is also were that the insured was not in sound health on the day of the alie, into the insured was not in sound health on the day of the alie, into the suffering from cancer; that then the policy of the unit the last was confined in the dock common house in the bars of the from June 10 to July 3, 1931, suffering from an limit the dispused as cancer. It is further alleged in an actional like with of

merits filed by defendant that the policy or incurred and upon

was issued on the application of someone purporting to be Agnes Siwula; that the person who signed the application was not in fact Agnes Siwula; that another was substituted for her, and that therefore the policy issued upon said application was void ab initio and of no force and effect.

The policy sued on was received in evidence upon the trial of this cause. It is dated June 15, 1931, and provides specifically that it shall not take effect if on the date thereof the insured is not in sound health. It appears from the evidence that deceased was admitted to the Cook county hospital June 10. 1931, and her illness was diagnosed as carcinoma, or cancer, of the cervix. She died as a result of this disease in April, 1932. Defendant produced evidence tending to show that the application for the policy was made June 12, 1931. The agent who took the application testified that the person whose picture was admitted in evidence and identified by Anton Siwula as a photograph of his wife was not the person who applied for the policy. There is evidence that Agnes Siwula was approximately 5 feet, 9 inches in height, whereas the person who applied for the policy, according to the agent, was not over 5 feet, three inches. An interne at the Cook county hospital, who attended deceased in June and July, 1931, testified that the cancer with which she was afflicted June 12, 1931, had existed for at least eight months prior thereto. Anton Siwula testified that the application for the policy was made on June 9. This presents about the only conflict in the evidence, most of which is documentary and undisputed, and as to this evidence James Aquavia, the agent, and also Anthony D'Arco, who was with Aquavia, testified that Siwula met them after the death of his wife and requested them to change the date of the premium receipt to June 9th, but that they refused to do so.

It therefore appears from the undisputed evidence that deceased was admitted to the Cook county hospital June 10, 1931,

was issued on the application of someone purporting to be the Siwula; that the person who signed the applieshon at not in fact Agnes diwula; that another a substituted for her, one that therefore the pelicy is used upon seic application were voice that therefore and of no force and affect.

The policy sued or varieties of its recommendation of trial of this cause. It is det d June 10, 18 1, and . wide specifically that it shall not tak first i on the the insured is not in sound health. It appear for it is the interpret that decamed who admitted to the county ho, pitel augo Av. 1931, and her illness was diagnosed as asteinoms, or career, of the cervix. She died us a result of this discone in spril, 1931. Defendant produced evidence tending to show that the _ 11 c tion for the policy was made June 13, 1931. The agent who trak the application tentified that the person whose picture or odmitted in evidence and identified by outon lawle as a plotograph of his wife was not the person who appliant for the coling. The cit svicence that Agges Siwula was approximately & feet, 9 inch s in bright, Alersas the person who applied for the policy, according to the agent, was not over 5 feet, three inches. In interno at the louk courty heapitel. who attended deceased in June and July, 1931, to that the tender oer with which she was afflicted June 18, 1-11, in maistar for at Least cift worths prior theret . . . top isuals t . if T . . if the application for the policy was made on June 9. This pres nots bout the only conflict in the evidence, no u or which is documentary and undisputed, and as to this evidence camer Aquavia, the cont, and also Anthony D'Arco, who was with Aquavia, too inled that simile met them after the death of his wife and requestor them a diang the ide of the premium receipt to Jure 9th, but that they refused to do to. It therefore appears from the undisputed vidence fact

deceased was admitted to the Jack county hospital June 17, 1931,

and was there continuously until July 3, 1931. The policy was issued June 15th. During this period her illness was diagnosed as cancer of the cervix. Disregarding any dispute that may exist as to the date of the application for the policy, the fact is evident that the applicant was not in sound health on the date of the policy, but was in fact seriously ill with a malignant disease from which she died the following year. It is impossible to believe that either on the day prior to her admission to the hospital or while in the hospital Mrs. Siwula could in good faith have considered herself in sound health. Recent authorities hold that it is not necessary to the avoidance of the policy that the applicant should know that her answers are untrue. (Western & Southern Life Ins. Co. v. Tomasun, 358 Ill. 496.) However, we are convinced that the issuance of this policy was procured through fraud. Although there is some slight conflict in the evidence as to the date of the application for the policy, the record is rather convincing that the application was made June 12 - the date that it bears. On that date Mrs. Siwula was in the Cook county hospital, and since the application was taken in her home there is at least a very strong presumption, as indicated by the record, that someone other than she made the application in her absence. Counsel for plaintiff cites no authority in his brief but upon oral argument relied solely upon the recent case of Walsh v. Prudential Ins. Co., 285 Ill. App. 226. After giving that decision respectful consideration, we are satisfied that it is at variance with the Tomasun case, supra, which is the most recent expression of our Supreme court on the subject.

Most of the material facts supporting the conclusion here reached are not disputed but are shown by documentary evidence, hospital records and the testimony of the interne at the hospital of the is, however, some slight conflict in the evidence as to the

and was there continuously until July 3, 1931. "he policy was issued June 15th. During this period her illuses on directed as cancer of the cervia. Identegrating why it attends the tany swint as to the date of the splication for the college as it is the evident that the appliant was not in curd he like an a date of the policy, but was in fact ser ourly ill til curi. papt disease from which she died the following year. The is the marible to believe that either or the day grior to he call and gotte hospital or while in the hospital ire. i wha could be east the have considered harself in sound hoalth. Heg t "Whorlifes write of to compliance odd of grandener don at that blod . Suries, with a manufacture that her the manufacture of the said (Western & Southern Life Ins. Co. v. Pomacur, AST TELL (LL.) However, we are convinced that the is and to take coling and procured through fraud. . Lithough that is now - In he something in the evidence as to the date of the anglistics are the olley, the record is rather commissing that the spulication was acce June 12 - the date that it beers; In that date are. indla was in the Cook county hospitel, and since the spiliestion was clash in her home there is at least a very strong prosumption, as indicated by the record, that someone other than the .a c the application in her observe. Joursel for plantal offer no authority in his brief but upon or a symment relied solely upon the weeks esse of Valen v. Prudential lar. Do., 285 711. .. . See Alt or giving touche describing with the Touch . The . The touche of the sometrey to expression of our Supreme court or the subject.

Most of the material facts augmenting also corolander here reached are not disjuted but are shown by documentary evidence, hospital records and the factionary of the interment at the horseis, some whight condict in the madence are to the

date of the application for the policy, and in view of this fact the cause will have to be retried. The judgment court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Sullivan, P. J., and Scanlan, J., concur.

date of the application of the policy, are two on this last the cause will have to be retried. The jurgment of ancient alpot court is reversed and the cause remember for a referral.

N. Watch Jane 1 addition.

Sullivan, I. J., and reanism, J., concur.

38725

MARY TESKI, Appellee,

V.

CONTINUINTAL ASSURANCE COMPANY, a corporation,
Appellant.

47

APPEAL FROM SUFERIOR COURT,
COCK COUNTY.

 $287 \text{ I.A. } 620^3$

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Mary Teski instituted suit in the superior court to recover under the terms of a life insurance policy issued by defendant insuring the life of her husband, Henry Teski. Demurrers having been sustained to the several pleas filed by defendant an "amended additional plea IV" was thereupon filed. Plaintiff's demurrer thereto being sustained, defendant elected to stand by its additional plea, whereupon the court entered judgment in favor of plaintiff for \$998. This appeal followed.

Plaintiff's declaration alleges that June 18, 1925, defendant issued to Henry Teski a certain policy of life insurance, copy of which is attached to the declaration, naming Mary A. Teski, wife of insured, as beneficiary; that Henry Teski died November 9, 1932; that all premiums on the policy had been paid in full and in advance up to the time of the death of insured; that due notice of death and proof of claim had been given defendant but that payment by defendant was refused.

It appears from the amended additional plea IV that the annual premium of \$38.85, which became due June 18, 1931, was not paid to defendant, but that July 13, 1931, insured paid the defendant \$20 to apply on the annual premium due June 18, 1931, and at the

a corporation,

MANY TRUKI, Appellee,

CONTINUATAL AUBURANCE COMPANY.

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MR. JUSTICE FRIMAD DULLY ROOTH OF LATER OF SHOULD

Mary Feeki instituted sait in the superior court to recover under the terms of a life in ar new policy issued by defendant insuring the life of her husbend, Hary T ki.

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Plaintiff's demarker thereto being surtained, coloudent check a to stand by its additional place, thereupon so court is rectudent in favor of plaintiff for \$600. This appeals one,

Plaintiff's declaration alleged that Jun 1., 1915, defendent issued to Henry Peaki a contringuity, or live in the copy of which is attached to the declaration, a ring 1 growing wife of insured, as beneficiary that annual color and color and all premiums on the policy had ear point a leaf and the advance up to the time of the declaration of the term of the color of the color of the term of term of the term of term of the term of term of the term of the term of the term of term of term of term of term of term of the term of term

payment by defendant was refused.

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annual premium of ,58.85, hick beck, du dan la, loi, est paid to defendant, but the fully lo, lot, incur c pric du dans ant \$20 to apply on the sunual premium due June 18, lebl, and at the

same time signed a certain note, which is set out in full in the plea. Under the terms of this note the insured agreed to pay the remaining installment of the premium due June 18, 1931, namely, \$18.85, on or before September 18, 1931. The note contains, among others, the following provisions:

"(1) That although said premium has not been paid in full the insurance under said policy shall continue in force until midnight of the day of the next installment due; (2) that the payment of each successive installment on or before its maturity shall further continue said insurance in force until midnight of the day the next installment becomes due; (3) that if all installments be paid in full on or before their respective maturities such payments shall constitute payment of said premium for said time and the Company will issue its usual premium receipt; (4) that if any installment be not paid in full on or before its maturity the insurance under said policy shall thereafter be as though none of said premiums had been paid and as if this note had never been given; the note itself shall thereupon cease to be a claim against the maker and any part of said premium previously paid shall be retained by the Company as its compensation for the extension of credit and other privileges given by the acceptance of this note."

The additional plea further averred that insured did not pay the defendant the installment of \$18.85 referred to in the note, or any portion thereof, on or before September 18, 1931; that there had been lent to insured in September, 1930, under the provisions of the policy \$114, no part of which had been repaid to defendant; that in August, 1932, which was about eleven months after the failure of insured to pay the \$18.85 installment September 18, 1931, as provided in the note, insured signed a certain application for reinstatement of the policy wherein he represented that his answers to the questions in the application were complete and true; that he was in good health; that he had had no disease, injury or illness since originally examined for the policy; and that he had not been attended by any physician, practitioner or surgeon, nor consulted any since the original policy was taken out. The plea further alleges that defendant, relying on the truth of the answers to the questions in the application for reinstatement did reinstate the contract of

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insurance; that insured died November 9, 1932; that at the time he signed the reinstatement application he was suffering from pulmonary tuberculosis and was an inmate of the municipal tuberculosis sanitarium in Chicago, and was not in good health; that the pulmonary tuberculosis and carcinoma of the stomach from which he was suffering caused his death November 9, 1932; that since insured was examined for the original policy of insurance he had been examined by and consulted physicians for pulmonary tuberculosis and other disorders, and that the false answers of insured to the questions in the application for reinstatement were made by insured fraudulently and with intent to deceive defendant and for the purpose of causing defendant to reinstate the policy of insurance; that because of said fraudulent representations in said reinstatement application the policy of insurance was not reinstated.

The additional amended plea IV further avers that any continued or extended insurance under the terms of the policy by virtue of the payment of \$20 to defendant July 13, 1931, expired prior to the date of the death of insured and on, towit, August 5, 1932.

additional plea IV it appears that the contract of insurance between Teski and defendant was dated June 18, 1925. The annual premium specified in the contract was \$38.85. The policy provides that after it had been in force for three full years the insurance company would lend, on the sole security of the policy, any sum which did not exceed the cash surrender value at the end of the then current policy year, as stated in the table of policy values; that a grace period of 31 days would be allowed in the payment of any premium after the first, during which time insurance would

The additional magnied plas Tollowser we have used as timed or extanded insurance under the policy of the payment of the coulds of the payment of the coulds of the date of the date of the first or the date of the first policy of the first of the first

From the facts which of the control of the control of the control of the specified in the contract the control of the control

continue in force. The contract provides that if the policy should lapse by reason of default in premium payment it could be reinstated upon written application to the company. The policy further provides that all premiums are payable in advance, and that except as provided in the policy the payment of premiums shall not maintain the policy in force beyond the date when the next premium is due. The policy provides for the computation of the reserve upon the American Experience Table of Mortality, and that the cash surrender value of the policy after three years shall be equal to the full reserve, omitting certain fractions, less a surrender charge of not more than 2-1/2% of the amount insured and less any indebtedness to the company; that the amount of paid up insurance and the term of continued insurance will be such as the cash surrender value would purchase as a single premium at the attained age of insured according to the American Experience Table of Mortality. It is provided under the heading of policy values that after the policy has been in force for three full years, upon default in payment of any premium, or in three months after such default, insured may elect one of three options: (1) to receive the surrender value of his policy in cash; (2) to purchase paid up insurance, payable at the same time and on the same conditions as provided in the policy; and (3) to have insurance for the face amount of the policy less any indebtedness to the company thereon continue from date of default without the right of cash loans, for such term as the net cash value will purchase. Under the third provision, and a coording to the table of policy values, at the end of the sixth year of the policy there was a cash or loan value of \$114, or continued or extended insurance for five years and 256 days. The insured, naving obtained from defendant \$114, the full amount of the loan value, there was no extended or continued insurance in effect June 18, 1931, when the policy lapsed for nonpayment of premium. The policy specifi-

continue in force. The contract prote state the the chief the lapse by reacon of def ult in promise a family to reach be remarked. woon written application to the empany. The police restore your ca in the state of the second of in the policy the pryment of practical and a los acts in the office in force beyond the date when the ment willing it due. The ball on word. In all the and are a court of the area and and and and and and and and area. ience Table of Mortality, and that out maranetry value of the policy after three years shall be could to the sail every, did not certain fractions, less a surgeren charge of to more dan -1 of the amount in ways and less cay in the carry to the come. . . . on. But the cap is ment of the one construction of the forms of of it as done of the bushout does for as done of the n class of the attained ago of incurred to the cold to muimorg Experience Table of Moraelity. It is provided that it is in of that is a control of the to the worlde of a rotal that well well of years, upon default in payment of my primium, or in the conting after such default, incurred may elect one of three on this off, o receive the surrender value of his policy in a day of the above paid up insurance, payable at the same that a entitle ant as provided in the policy; and (2) to not it up no 'o. She include amount of the policy less any tunebtrdness in a company the the of the of there to refer the and the also to state mort sumit term as the net cash value will ourch o. in the first or the and a coording to the table of policy v lune, and a cording year of the policy there was a distinct of the contract tinued or extended insurance for live regreed wife. The indihaving obtained from defendent "lill; in tall mount of the there was no extended or continue insurence in first tune 1 , 7 when the policy lapsed for nonpyment of putnium. The olicy : - - cally provides that the term of continued insurance shall be such as the cash surrender value will purchase as a single premium at the attained age of insured according to the American Experience Table of Mortality.

From the facts admitted by the demurrer to the additional plea IV, it appears further that July 13, 1931, after the policy had lapsed but within the grace period, insured paid \$20 to defendant and signed the note in question, and agreed to pay the remaining installment of \$18.85 on or before September 18, 1931. The contract of insurance, under the provisions of the note, remained in force up to and including September 18, 1931. Defendant contends that the failure of the insured to pay the installment due on that date caused the policy to lapse as of its due date of June 18, 1931. This contention is based upon the provision in the note which specifically provides that if the installment of \$18.85 was not paid September 18. 1931, the insurance under the policy should thereafter be as though the premium had not been paid and as though the note had not been given; and that the note itself should thereupon cease to be a claim against the maker and any part of the premium previously paid should be retained by defendants as its compensation for the extension of credit and other privileges given by the acceptance of the note.

Based upon the facts disclosed by the pleadings, it is first urged by defendant as grounds for reversal and to sustain its position in this controversy, that the note was not a payment of the premium, but was a mere accommodation to the insured to be construed in accordance with its terms; that inasmuch as insured failed to pay the installment of premium in accordance with the plain provisions of the note the policy lapsed June 13, 1931; that since insured had obtained the full amount of the cash or loan value of the policy there was no continued or extended insurance in force at the time of his death. Several decisions in other states and one in

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Based upon the facts wis loses by the play one, it is the urged by defendant or grounds for the conformal for the conformal for the conformal form of the conformal formal formal

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Illinois, where the legal effect of similar notes executed by insured persons were considered, are cited by defendant to sustain its position. In White v. New York Life Insurance Co., 200 Mass. 510, a note was given by insured which had provisions similar to the note set forth in the amended plea. The note there contained the following, among other provisions:

"This note is accepted by said Company at the request of the maker, together with \$31.25 in cash on the following express agreement: that although no part of the premium due on the 19th day of August, 1906, * * * has been paid, the insurance thereunder shall be continued in force until midnight of the due date of said note; that if this note is paid on or before the date it becomes due, such payment, together with said cash, will then be accepted by said Company as payment of said premium, and all rights under said policy shall thereupon be the same as if said premium had been paid when due; that if this note is not paid on or before the date it becomes due it shall thereupon automatically cease to be a claim against the maker, and said Company shall retain said cash as part compensation for the rights and privileges hereby granted, and all rights under said policy shall be the same as if said cash had not been paid nor this agreement made."

With reference to the provisions of that note the Massachusetts court held that the agreement signed by the insured was binding on him; that the note was not paid and for that reason, by virtue of the agreement, it coased to be a claim against the maker; that

"the \$31.25 in cash was treated as a consideration for the privilege which the assured had enjoyed; and the rights of both parties in reference to the policy were precisely the same as if this note had never been given, and the payment in cash had never been made. It is impossible to make the agreement plainer than it is by the written language contained in the note."

In Talsky v. New York Life Insurance Co., 280 N. Y. S. 69 [244 App. Div. 661], suit was brought under a life insurance policy containing provisions for disability indemnity at a premium of \$210.20, payable annually on June 18. The premium due on June 18, 1933, was not paid, but within the thirty day grace period plaintiff requested defendant to extend the period of payment, paid part of the premium, amounting to \$37.50, and executed a note extension agreement which provided that in addition to the \$37.50 paid by the insured he should pay the balance of \$172.70 on or before October 18, 1933. July 4, 1933, insured became totally and permanently

18, 1933.

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insured he should pay the balance of \$172.70 on or bufore October

July 4, 1933, insured became totally such permanently

disabled and failed thereafter to pay the balance of \$172.70, according to the provisions of the note. In June, 1934, the insured tendered to defendant the arrears of premium, contending that the note had cured any default existing prior thereto and had continued the policy in force until October 18, 1933, thus entitling him to recover for the disability which had previously occurred. The insurance company contended that the note had not been paid and the policy had lapsed for nonpayment of premium June 18, 1933, according to the provisions of the note which were similar to the provisions of the note in the case before us. In discussing the question under consideration the court pointed out that there was no ambiguity in the provisions of the note; that under plaintiff's agreement, if he did not pay the note when due, his rights would be the same as those of any other policyholder who had defaulted in the payment of premium due June 18, 1933; that the continued life of the policy was conditioned on payment of the note when it matured; that when the note was not paid the conditional privilege was lost and the original default of June 18, 1933, remained. Eddie v. New York Life Insurance Co., 75 Cal. App. 199 [242 Pac. 501] and Underwood v. Jefferson Standard Life Insurance Co., 177 N. C. 327, are to the same effect.

In <u>Keller</u> v. <u>North American Insurance Co.</u>, 301 Ill. 198, the Supreme court of this state had occasion to pass upon the question under consideration in a case where the note was given in part payment of a premium due December 30, 1913,

"with the understanding that all claims to further insurance and all benefits whatever which payment in cash of said premium would have secured, shall become immediately void and forfeited to said Company if this note is not paid at maturity."

It was there contended that since the premium was paid partly in cash and partly by notes, an agreement to receive the notes as absolute payment of the premium was established, but the court held otherwise,

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In Keller v. Morth imerican Insurance 70., 301 Ill. 198, the tupreme court of this state had occasion to pass upon the dustion under consideration in a case where the dote was given in part payment of a premium due December 30, 1915,

"with' the understanding that all claims to further insurance and all benefits whatever which payment in cash of said premium would have secured; shall become immediately void and forfeited to said Company if this note is not paid at maturity."

It was there contended that since the premium was paid putly in cash and partly by notes, an agreement to require the notes as absolute payment of the premium was established, but the court held otherwise,

saying (p. 205):

"This contention is not sound because the notes both state in the same sentence in which it is said that the note is given in part payment of the premium due, that the notes are accepted by the Company 'with the understanding that all claims to further insurance and all benefits whatever which payment in cash of said premium would have secured, shall become immediately void and be forfeited to said Company if this note is not paid at maturity.' * * By the plain terms of these instruments they were accepted in part payment conditionally on their being paid at maturity, and if not so paid all claims to further insurance, and all benefits whatever which payment in cash would have secured, were forfeited and the policies became void."

We think that the foregoing decisions sustain defendant's contention that the note was not a payment of the premium. The note in the case at bar was similar to the notes involved in the cases cited, and as was said by the Massachusetts court in thite v. New York Life Insurance Co., supra, "it is impossible to make the agreement plainer than it is by the written language * * *."

Plaintiff seeks to minimize the force of the foregoing decisions by stating that "in none of those cases does the question arise as to whether the note is payment of the premium." This statement is not accurate, because in the case of Keller v. North American Insurance Co., supra, the court, in discussing what it characterizes as the "most important question," namely, whether the policies were in force when insured died, states the rule of law to be reasonably well settled that

"a note given by a debtor for a precedent debt will not be held to extinguish the debt in the absence of an agreement to that effect, but will be considered as conditional payment or as collateral security or as an acknowledgment or memorandum of the amount ascertained to be due. The doctrine proceeds on the obvious ground that nothing can be justly considered as payment in fact but that which is in truth such, unless something else is expressly agreed to be received in its place. That a mere promise to pay cannot of itself be regarded as an effective payment is manifest."

The court then quoted from Story on Promissory Notes, cited in Heartt v. Rhodes, 66 Ill. 351, as follows:

"In general, by our law, unless otherwise specially agreed, the taking of a promissory note for a pre-existing debt or a contemporaneous consideration is treated prima facte as a conditional payment, only, - that is, as payment, only, if it is duly paid at maturity."

This contention is not cound becomed the note, both state in the same sentence in which it is said that the note is given in part payment of the premium due, that the not core accepted by the Company with the understanding that all claims to further insurance and all benefits wastever thich payment in cash of said premium would have secured, shall become immediately void and be forfeited to said Comocny if this note is not paid at maturity. * * * By the plain terms of these instruments they were accepted in part payment conditionally on their bring paid at maturity, and if not so paid all alems to lurther insurance, and all benefits whatever which payment in each would have scourt and all benefits whatever which payment in each would have scourt were forfeited and the policies become void."

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We think that the foregoing decisions sustain defendant's contention that the note was not a payment of the promium. The note in the case at bar was similar to the notes involved in the cases sited, and as was said by the Massachusetts court in White v. New York life

Insurance Co. surra, "it is impossible to make the server at plainer than it is by the written language * * *,"

Plaintiff socks to minimize the force of the foregoing decisions by stating that "in none of those cases does the question arise as to whether the note is payment of the premium." This statement is not eccurate, because in the drae of Koller v. Horth American Insurance Co., suppa, the court, in discussing what it

characterizes as the "most important question," namely, whether the policies were in force when insured died, states the rule of

law to be reasonably well settled that

*a note given by a debter for a procedent debt will not be held to extinguish the debt in the absence of an agreement to that effect, but will be considered as conditional payment or as collateral security or as an acknowledgment or memorandum of the amount asceptained to be due. The destrine proceeds on the covious ground that nothing can be justly considered as payment in fact but that which is in truth much, unless something else is expressly agreed to be received in its place. That a more promise to pay onunct of itself be regarded as an effective payment is number."

The court then quoted from Story on Fremissory Motor, dited in Mearity

"In general, by our law, unless otherwise specially agreed, the taking of a promiseouy note for a pre-existing debt or a son-temporances consideration is treated prime factor as a conditional payment, only, - that is, as payment, only, if it is duly paid at maturity, "

The court concluded its discussion of the point as follows:

"In the absence of an express agreement by the company to accept the notes in question as an absolute payment of the premium the premiums cannot be considered paid."

In harmony with these decisions the policy in question should be deemed to have lapsed at the time the annual premium became due, and since insured had prior thereto obtained the full amount of the cash or loan value of the policy there was no continued or extended insurance in force at the time of his death. According to the provisions of the note defendant is authorized to retain the sum of \$20 as compensation for the extension of credit and other privileges given by the acceptance of the note. A similar provision was approved in White v. New York Life Insurance Co., supra.

Plaintiff argues, however, that we ought to consider the payment of \$20 on July 13, 1931, and retained by defendant, as part payment of the premium, as the result of which insured would be entitled to any extended or continued insurance for the period covered by the \$20 thus paid. There is no merit to this contention, because the length of the continued or extended insurance in any event is an actuarial question, and since it is specifically averred in the amended additional plea IV, and admitted by the demurrer thereto, that any continued or extended insurance under the terms of the policy by virtue of the payment of \$20 to the defendant on July 13, 1913, expired prior to the date of insured's death, and, on towit, August 5, 1932, it is difficult to understand how plaintiff can now avail herself of the argument made.

As to the reinstatement of the policy, the allegations of the mmended additional plea, if taken to be true, clearly indicate that misrepresentations of fact were made by insured which constituted fraud. It is averred that when the application for reThe court concluded its discussion of the point a rollows:

"In the absence of an express agreement by the company to accept the notes in sucction as an absolute payment of the premiums counct be considered paid."

In harmony with these designs the policy in question should be deemed to have lapsed of the time the annual premium became due, and since insured had prior thereto obtained the full emount of the cash or losa value of the policy there was no continuad or extended insurance in force at the time of his destinace of the provisions of the note defendant is authorized to retain the sum of \$20 as compensation for the extension of credit and other privileges given by the esseptance of the note.

A similar provision was approved in hite v. New York Life Insurance of and Talery v. New York Life Insurance.

Plaintiff argues, however, that we ought to consider the payment of \$20 on July 13, 1911, and retained by defendent, all part payment of the premium, as the result of thick intured would be entitled to any extended or continued insurance for the period covered by the \$20 thus paid. There is no merit to this postention, because the length of the continued or extended insurance in any event is an actuarial question, and since it is specialcally averaed in the amended additional plen IV, and admitted by the damager thereto, that any continued or extended incurance under the terms of the payment of \$20 to the defautt on July 13, policy by virtue of the payment of \$20 to the defaut on July 13, August 5, 1932, it is difficult to understand how plaintiff can now avail herself of the argument made.

As to the reinstatement of the policy, the clickations of the amended additional plea, if taken to be true, plea, ly indicate that misrepresentations of fact were made by insured which concitived fraud. It is overred that when the application for re-

instatement was made insured was a patient in the Chicago Municipal Tuberculosis Sanitarium, that he was afflicted with pulmonary tuberculosis and cancer, and these allegations are admitted by the demurrer to be true. Under the circumstances we think the defense interposed, that the policy was not reinstated and was not in force at the time of insured's death, is well taken. The policy was reinstated upon the representations made by insured that he was in sound health, that he had not been treated by a dooter, etc. These representations, if true, would have entitled him to reinstatement. However, since they were manifestly untrue, and admitted to be fraudulent by plaintiff's demurrer to the amended additional plea, it would seem to fellow that defendant had a right to set aside the reinstatement and refuse to honor the claim.

Other points raised by plaintiff present no convincing reasons for sustaining the judgment. We are of the opinion that the court erred in sustaining the demurrer to the amended additional plea IV. Judgment of the superior court is reversed and the cause remanded with directions that the demurrer be overruled and further proceedings had in keeping with the views herein expressed.

meversed and remanded with directions.

Sullivan, P. J., and Scanlan, J., concur-

instatement was made intuited and a patient in the Chicage Canicipal Tuberculosis and cancer, and house allogations are arritted by the femanes to be true. Under the careametraces of think the fatterposed, that the policy was not reinstated and were not in famor of the the the careametrace and were not in famor of the the the the the think the feath, is well to see. The olicy was reinstated upon the representations made by insured that he had not been breated by doctor, sic. Income representations treated by doctor, sic. Income representations from the time, would have capitated our or reinstated the Heyrer, Heyrer, since they were manifestly unture, see they were manifestly unture, see that of the representations and colors if the plant of plaintiffs demurrer to the sanded additional often, it will been to fellow that detended had a right to not call the refreentand refuse to honor the claim.

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ENTER A LAL T MERITO INE IL TOTOTOR.

Sullivan, F. J., and centen, J., concur.

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PALACE LIVE POULTRY CAR COMPANY, a corporation,

Appellee,

v •

ALEX GETZ,

Appellant.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to reverse a decree of the circuit court holding him to account to plaintiff for the use by defendant as well as by others, including Getz Poultry & Egg Corporation, of a certain railway car designed for the transportation of live poultry.

The original complaint named Getz and Getz Poultry & Egg Corporation as defendants. Demurrers filed by both defendants were sustained, and plaintiff filed an amended bill. Getz filed his answer thereto, and Getz Poultry & Egg Corporation demurred. By stipulation of the parties plaintiff was then given leave to file a second amended bill, which Getz again answered. The demurrer thereto by Getz Poultry & Egg Corporation was sustained, and the corporation was thus eliminated as a defendant and no relief is sought against it.

The issues thus made by the second amended complaint and Getz's answer were referred to a master in chancery, who heard the cause and filed a report recommending that Getz be held to account to plaintiff for his use of the car in the transportation of live poultry. Exceptions to the master's report were sustained by the chancellor, and the decree appealed from was entered directing

PALACE LIVE PULLLY CAR CURRAIN.

App lles,

ALEX CETZ.

DAK KUNT.

ME. JUSTICE PRIMAR PRINCE TO STRUCK OF THE STILL .

By this appeal delandant series to review a uporce of the circuit court holding him to necount to plaintiff for the use by defendent as well as by others, including beta foultry & Egg Corporation, of a certain railway on design of or the transportation of live boultry.

The original complaint damed Gets and Gets Couldry ? Mgg Corporation as defendents. Demutr so filed by both defendents were sustained, and plaintiff filed on curnded bill. Fet. Illed his answer thereto, and Jets Poulity & Tag Corporation Campred. By stipulation of the partics phiancies was then iven long to Tile a second surnied bill, thith the open second out the demurrer therete by deta roulity a dry sorror sion was and the corporation was thus altimated and almost no more ti taniens though it leifer

The issues thus made by the second on meed complete, and Getz's answer were referred to a master in an mast, who heard the cause and filed a report recommending that Jetz be held to account evil to not stroughest wit at a set to eeu aid tol littleig of Exceptions to the master's report were quetained · VIII Luoq Getz to account to plaintiff for the use of the car in question, "so far as Getz may have used it or permitted its use by others, including Getz Poultry & Egg Corporation."

The facts, so far as they are material to the issues involved, disclose that Getz had from time to time procured cars from Live Poultry Transit Co., predecessor in interest to plaintiff (hereinafter termed plaintiff's predecessor), not only for transportation but also for the storage of live poultry. Such a car was procured by him October 19, 1924, pursuant to a bill of sale which recited a consideration of \$125 and described the car as "one (1) wooden superstructure railway car, designed for the transportation of live poultry, and for convenience bearing the number 3434; subject to license agreement covering royalties on patents, this day entered into between the parties hereto." At the same time Getz executed and delivered the so-called license agreement, dated October 16, 1924, reciting in substance that Live Poultry Transit Co., a Delaware corporation, referred to as the "licenser," had the exclusive license for the use of all patents and applications for patents relating to railway cars for the transportation of live-poultry, and granting unto Getz, as licensee, the right to the use of said patents in connection with the car purchased by him, and for no other purpose, so long as the car should be used by Getz for the storage of live poultry, without royalty, but that in case Getz should thereafter use the car for the transportation of live poultry, then the licenser agreed that the amount of royalties to be charged to and paid by Getz should be exactly the same sum of money per trip as is covered by the railway tariffs in effect pertaining to the rental of live poultry cars, as approved by the Interstate Commerce Commission, together with the additional sum therefor, as a part of the royalty, equal to the mileage allowed

Getz to account to plaintiff for the unit of in 0 comes.
"so far as detz may have used it or 1 mits of the D. Stales, including Setz Poultry & Las Corporation."

The facts, no far as they are with the be and an are involved, disclose that the the land of the collection of the from Live Foultry Francit Co., or december in int to te the sleintill (hereinefter termed plain diffe produced or), are only ler transportation but also for the store is of live soulders, not car was procured by him Potober 18, 1924, u. and . . . 111 of two di tiditorsh bur dil lo moltenobionoo a beticet doida else as "one (1) wooden auperstructure relimit one, transportation of live poultry, wat for some classes the las no abide of pair we directly bemodf of topidua (1848 redmund patents, this day entered into b treen the patent allers. . . . the same time Gets executed and religion time out to a light and agremment, dated October 16, 1984, remitting in the contract into Poultry Transit Co., a Valamare corporation, . introduction time "Micenser," had the exclusive license for the we or .11 petents as applications for patents relating to relawy ours for the transportion of live poultry, and grenting unto Gets, as librared, the inche to the use of cuid patents in anacction fin the and murchard by him, and for no other purpose, so lon we the sar shoals be used by Geta for the stores or Live portery, them comity, and in case Gets should thereafter was the see or the transport than of live poultry, then the liberth or of the the though of realist. to be charged to and pric by Late would be execuly the same our ca mency per trip as is covered by the maily a tariffe in if of p rtaining to the ratal of liv poultry same, as an over by the Interstate Commerce Commission, logether with the and blonch case therefor, as a part of the royalty, equal to the mileage clicaed

and paid by railroads for the use of live poultry cars covered by railroad tariffs approved by the Interstate Commerce Commission.

After using the car several years for storage purposes only, and never for transportation, it became pretty badly worn and Getz sought from plaintiff's predecessor an estimate on repairs. Instead of repairing the old car, however, plaintiff's predecessor delivered to Getz another car, No. 3435, "in place of" car No. 3434, as Getz testified. The exchange was made without the passing of any bill of sale or other writing.

In 1928 Getz received an inquiry from the Pennsylvania railroad yardmaster as to the ownership of the second car, No. 3435. Getz was advised that if he did not establish title to this car in himself he would be charged demurrage, trackage, etc. By way of reply Getz exhibited the bill of sale and contract relating to car No. 3434, but when the railroad employee observed the discrepancy in the numbers, Getz took the original bill of sale and contract back to plaintiff's predecessor and contacted one Waldo Johnson, vice president of the concern, and told him that "the railroad is after me; you better give me something, a bill or something, on 3435, showing that it belongs to us." Johnson took the two documents to another room and upon his return handed them back to Getz with the number 3434 changed to 3435 on both the bill of sale and the license agreement. Getz accepted the documents as altered.

It is conceded, of course, that under the license agreement which accompanied the bill of sale to car No. 3434 Getz was limited to the use of the car for storing live poultry only, without royalty, and that in no event would be have been permitted to use the car for transportation of live poultry without paying royalties and mileage therefor, in accordance with the schedule approved by the Interstate Commerce Commission. Getz takes the position, however, that since no

and poid by railroads of the we calle poultry are using railroad tariffs approved by the interacts.

and never for transportation, it became present but ly some an established sought from plain off's preducessor and neutrice and repairing the cld one, however, all nuith to preducessor distributes another car, we have to determine the evolution of the crohence was made all the parties. The evolution made all their parties of an evolutions are made all their parties of an evolutions.

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It is conceded, of course, the union the lie not a ree no which accompanies the bill of make to or to. And the taken limit of the use of the ear for atoring live posting unity unity, ishout regality and that in no event would be have been presided to at the earlier transportation of live positry tithout paying rogalities and relicing therefor, in accordance with the considering the the interestion, the accordance with the considering hower, the their the formerce Commission. Outs takes the position, hower, that since no

new bill of sale or license agreement passed between the parties at the time Getz obtained car No. 3435 by trade, the license agreement theretofore existing was thereby rendered void by merger of title; that the limitation which had been placed upon the use of the car under the original license agreement was removed when the exchange was made; and that thereafter Getz was at liberty to use car No. 3435 not only for the storage of live poultry but also for the transportation thereof, without subjecting himself to the charges for royalties and mileage imposed by the original agreement pertaining to No. 3434. We cannot concur in this contention for several reasons. Getz himself testified that he received car No. 3435 "in place of" car No. 3434, and it was evidently his understanding that because of the circumstances under which the exchange was made and the bill of sale later altered the relationship between the parties had not changed. Moreover, when the railroad authorities demanded of Getz proof of his ownership of car No. 3435, he exhibited the original bill of sale and license agreement, thereby indicating, we believe, that he recognized owning car No. 3435 under the conditions specified in the original bill of sale and license agreement. Furthermore, if Getz himself had not considered the written instruments altering the conditions under which he purchased car No. 3434 as applicable to the possession of car No. 3435, it is difficult to understand why he accepted from plaintiff's predecessor the original bill of sale and license agreement with a mere alteration of the car numbers. It also appears from the evidence that in 1932 Getz represented to the officials of the railroad company that he owned car No. 3435, and to prove his ownership he exhibited to them the same original bill of sale and license agreement with the altered numbers thereon. In view of these circumstances he cannot now claim that the limitations were removed when he acquired the second car. Such claim is inconsistent with his subsequent conduct by which he held himself out as the owner

new bill of oale or license uprochant saund ustween the purties at the time deta obtained car Mo. (455 by tr. , th license agrees ment therefore existin was thereby renders would by moreor of to see the the limitation which had been placed upon the teltit the car under the original License agreement was removed when the exchange was made; and that thereafter 'keta was at liberty to use car No. 3435 not only for the story se of live perluny but the for the transportation thereof, without subjectin limself to the charges for royalties and mileage imposed by the original agreet po taining to No. 3434. Te cennot concer in this cent which for any real reasons. Gots himself testified that he reactives of John 705 in place of car No. 3434, and it was evidently his understandin that bec use of the circumstances under which the exchant, was the bill of sale later altered the relationship between the parties Moreover, when the railroad rathoritics demanded had not changed. of Geta proof of his ownership of car do. 36.6, he enhibited the original bill of sale and license agreement, thereby indicating, we believe, that he recognized ownin car No. MASS under the conditions specified in the original bill of a le and license a reemont. Furthermore, if Getz himself had not convidered the critten insure ments eltering the conditions under which he purchaged our No. 3'54 as applicable to the possession of our No. 3435, it is difficult to understand why he a coapted from plaintiff's predecessor the ort dual bill of sale and Ricense agreement with a mere alteration of the sar numbers. It also appears from the evidence that in 1932 Gata represente to the officials of the relirend company in the best to at the off B, and to prove his emership he edibited to them the same orlained the of sale and license agreement with the altered numbers thereon. In view a those circumstances he cannot now clota that the limitations were removed when he acquired the second car. uch claim is inconsistent with his subsequent conduct by which he held hisself out at the owner

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of car No. 3435 subject to the license limitations applicable to car No. 3434.

It is next urged that Johnson, as vice president of plaintiff's predecessor corporation, had no authority by virtue of his office to make a contract for his company or to alter the terms of the contract theretofore made. We think it is a sufficient enswer to this contention to quote from the record, indicating that substantially all of Getz's dealings had been had with Johnson and by which Johnson's authority to act for plaintiff's predecessor is pretty clearly established. The following excerpts are taken from the cross-examination of Getz:

When you went to take these papers up to Mr. Johnson, how come you didn't take them to Mr. Mudd who signed them, you knew him, didn't you?

I wasn't doing business with Mr. Mudd. Mr. Mudd had signed these papers? A.

Q.

I know it, but my transactions were with Mr. Johnson A. the time.

Hadn't you ever transacted business with Mr. Mudd? Q. Not to my knowledge. I even borrowed twenty thousand

A . dollars through Mr. Johnson.

You had never transacted business with Mr. Mudd? Q. I never asked Mr. Mudd for anything.

Q. Did you know him?

the instruments as modified binding on him.

A. Yes, casually, not intimately.

So when you wanted the numbers changed in these papers Q.

instead of taking them to him you took them to Johnson?

Yes. " A.

It is further urged that the exchange of cars and the alteration of the original bill of sale and contract as to the car numbers constituted a modification of the original agreement and required a new consideration to support it. Getz admitted receiving the second car to replace the one which was no longer useful to him. This of itself was a sufficient consideration. In addition thereto the record is replete with evidence indicating that Getz exhibited the altered documents to various persons as proof of his individual ownership of car No. 3435, and the acceptance of the altered documents made

Defendant's counsel apparently concedes that the finding

of car No. 5435 subject to the li case limit will the bill to car Ho. 3434.

It is next urged that Johnson, as vice printed of plaintiff's predecessor corporation, had no authority by virtue of high office to make a contract or his company or to elter the terms of 's thick it is a sufficient ; nower . abem arolojaradi toaringo adi to this contention to quote arm the record, indic ring that suittantially all of Cata's deplings bod see had it is to les the by which Johnson's subject to set for pl instit a greeces to the pretty clourly established. The following the granges water rom the cross-expandation of Gets;

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Mr. Mudd had signed these peperc? . 9

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Defendant's coursel ... prently creeded that the finding

of the master that Getz should be held to account for any rental or mileage received by him for transporting poultry in car No. 3435 is proper, because he characterizes that finding as "probably the correct view," but it is argued that Getz's liability to account should not extend through the period of proprietorship of this car by Getz Poultry & Egg Corporation. The record contains a history of the various names under which Getz operated his business since 1924. He encountered many vicissitudes following the delivery to him of car No. 3455. In 1929 the business was taken over by a corporation known as Alex Getz & Co. In 1930 it was succeeded by Getz Poultry & Egg Corporation. The relationship of these concerns is not clear, but they were evidently formed to carry on the business which Getz had initiated. Getz testified that his only interest in the corporation was that of manager in general charge of the operations of the company, with all of the authority and responsibilities of that position. According to his testimony Getz Poultry & Egg Corporation was organized in 1930 at the instance of his brother, Meyer Cetz, and one Mr. Meyer, both of whom were Getz's employees. Getz's wife also had a substantial interest in the new company and was active in its affairs. The personnel of the organization remained practically unchanged under the successive proprietorships. Several employees of the business testified that they recognized the defendant, Getz, as their employer throughout the period of these changes. W. L. Kendall, general dairy agent of the Brie railroad, testified that Getz telephoned him in 1932 "stating that that car belonged to him, and any rental or mileage accruing on that car should be paid to Mr. Getz, as he was the owner of the car," and that "he told me to substantiate the fact that he was the owner of the car he would forward me a copy of the bill of sale; that thereafter Kendall received from Getz a copy of the

Intuit of the control of block of bluer; at ab tank tetrace and to or milenge received be tim or transportin party or see to, sten is proper, bronure he characterine, that ding a for the the trow . The william of the transfer of the transfer too troops of the full transfer too troops should not extend throat Little . I had a port to hip of this our by deta foultry & Mg Copper Men. The record health Miserory of the various names under abloat to open to do his bosinous rince He encountered many violations of 1.0. in it. in the total him of cur wo. 5055. In 1855 the basing, as to a ver by a corstat, ye lob les are a lifted at lot 8 stat make an accas acidates Poultry & Jag Corporation. The relationally at a reason service is not clear, but they were evicably formed to a rey on the aminost which Gotz had initi. ted. Into the Citi of our of his anth and and in the corporation we that of contract in gran at it. go or the -language of the company, with all a tie file company, or to the company, bilities of that position. Motoruin, so his bartheony is a scultry & Bag Corporation was organized in 1950 st the in Cace of his brother, Meyer Cetz, and one Mr. I yer, beth on whom were deta's employees, Gotz's wife also had a subst mill inter st in the new company and was active in its affairs. The p Boom 1 of the organization remained practicelly unchanged under the successive proprietoralists . u. mitagi sit ie asevolges laravac . aqidarotoirqorq they recognized the defendent, deta, as their ampace a throughout the period of these changes. avaduli, general being agent of the drie railroad, testified that set, telepronet in 1932 "stating that car belonged to him. no any rental or milenge accruing on that car chould be paid to Ir. Beta, w. h. w. the owner of the car, " on that "h tole me to . weetentiste the ". xee ent le was the owner of the car he would forward me a cour of the bill of sale;" that thereafter Kendall received area hats a copy of the bill of sale, designating car No. 3435. David P. Skinner, western dairy agent for New York Central Lines, testified that April 30, 1932, Getz telephoned him that he was shipping car No. 3435 with live poultry to New York; that he replied to Getz, "Since when have you been in the car business?" and that Getz replied "Oh! I have owned these cars for a long time." The testimony of these witnesses is undisputed, and from this evidence the nature and extent of the corporation's proprietorship of the car would seem extremely doubtful.

Getz testified that in the fall of 1930, following the organization of Getz Poultry & Egg Corporation, he sold car No. 3435 to the company, executing a bill of sale therefor and together therewith delivered to Getz Poultry & Egg Corporation the original bill of sale and license agreement showing the altered car number. When asked what he received in payment for this transaction Getz first stated that he did not remember, later recalled that "it was nothing less than a dollar," and ultimately stated that he got a "job and some money" for the car, the job being that of manager. In the light of this testimony and the circumstances of the case we cannot sustain defendant's contention that Getz Poultry & Egg Corporation was the bona fide owner of the car in question. We are of the opinion that the chancellor properly held that Getz individually should be liable for any revenues accruing under the terms of the original license agreement because of the use of car No. 3435 for transportation purposes by Getz individually, as well as by other persons or corporations using the car with Getz's consent or permission, including Getz Poultry & Egg Corporation. Marsh v. Dodge, 66 N. Y. 533, cited by plaintiff, sustains this conclusion.

Lastly it is urged that plaintiff is guilty of <u>laches</u>. This issue was not raised by the pleadings and consequently plaintiff was not required to introduce evidence explaining the delay in instituting

bill of sale, designating our Mo. 3435. Is vid P. Chinner, western dairy agent for New York Central Lines, testified that pril 31, 1932, deta telephoned him that he can chipping out the fitter poultry to New York; that he replied to Ceta, "that amplied have have you been in the car butiness," and the deta replied "Oh! I have a med these cars for a len time." The testingueses is undisputed, and from this settence the neture and extent of the corporation's proprietorally of the corporation.

Geta toutified that in the fall of 1930, followin the organization of fots Poultry & Res Corporation, he cold our fo. 6438 to the company, executing a bill of a lether for and the street therewith delivered to Gots Toyling A 13: Corporation 'Confidual bill of sale and licence agreement distinct the eltered our amber. When asked what he readived in payment for this ir numbel on Grin first stated that he did not remember, later verylint wit was nothing less than a dollar, " and ultimately stated she not a "job and some mon y" tor the car, the job bein the be at manager. In the light of this testimeny and the direcestances of the case we counce sustain defendant's contention that Gets Foolery & For Corporation was the bana fide owner of the errilen. 'e are of the opinion that the chancellor proposity held and that individually should be lisble for my revenuer no rush under the term of the original listance agreem at because of the u of on Mo. At 5 for transportation purposes by "the individuality, or well to by other persons or corporations usin the car with atz's consum or will mission, including Athaloultry ? . Jorper with . . object 66 M. Y. 533, cited by plaintiff, suctains tills conclusion.

Lastly it is urger that thinded in milty of locker. This issue was not reised by the plandings can consequently plain its was not required to introduce evidence explaining the delay in instituting

suit. The law is well settled that <u>leches</u> may not be invoked unless pleaded. (<u>Ogden</u> v. <u>Stevens</u>, 241 Ill. 556.) Defendant in his reply brief concedes this to be the rule.

We find no convincing reasons for reversal of the decree and it is affirmed.

AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

units. The live to well stilled that hears only so se invoked united planted. (green v. towers, sale is. sec.) a fendens in the reply brief concede this to be the rule.

We find no touthout were out for revenuel as the decrete and it is estimated.

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Sullivan, I., J., and Desalon, J., concur.

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XEMOPHOW PAVLOS,
Appellant.

Y .

BERT CARLSON and MILTON ADELMAN, Appellees. APPEAL PROM SUPERIOR COURT.

APPEAL FROM SUPERIOR COURT,

287 I.A. 621

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Bert Carlson, one of the defendants herein, brought suit in the municipal court against plaintiff to recover damages resulting from an automobile collision. The suit was determined adversely to Carlson and he thereupon brought a second suit based upon the same facts, which again resulted in findings and judgment in favor of Paylos and against Carlson. Thereupon plaintiff filed a bill in the superior court seeking to restrain Carlson and his attorney, Milton Adelman, from instituting further proceedings, and asking damages resulting from the second municipal court suit including reasonable attorney's fees and costs. The superior court entered a restraining order but refused to award damages to plaintiff. By this appeal plaintiff seeks to reverse that part of the order or decree which denied him the damages sought.

Defendants have not appeared or filed briefs on appeal, and plaintiff's one contention in urging that a portion of the decree be reversed so as to include damages incurred by him in defending the municipal court suits is that he was put to expense and loss of time in interposing a defense to two frivolous and vexatious suits, for which he should be compensated. It is argued that since the chancellor took jurisdiction of the cause and granted

MEMOPLOW P.VECE, Appellant,

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Bort Carlson, one of the defeadents herein, beon ht silt in the municipal court against plainsist to recover demagne resulting from an automobile collision. The suit was determined adversely to Carlson and he thereupon browths of a come with head upon the same facts, which again resulted in Vincinus as judgment in favor of Paylos and against assisted. Thereupon the superior court south, to return the superior court south, the court of the strong damages resulting item the court of a court of a court of the court of

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court entered a restraining drier have a sure of the control of the plaintist. By this apport plaintist control of the order of the order of the hard have not be able to the control of the order of the sure of the control of the co

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and lons of time in interposing a defense to the ivolous at verntious suits, for which he should be compensated. It is a good that since the chanceller took jurisdictors of the order and stated

an injunction that he should have also granted plaintiff complete relief by awarding him the expense and loss of time incurred in connection with the second municipal court suit, including attorney's fees. Reach & Co. v. Harding, 348 Ill. 454, is the only case cited to support this contention. That case merely helds that equity, having jurisdiction of a matter, will grant full relief even though legal remedies must be administered in so doing.

The defence of the second suit was undoubtedly vexatious and put plaintiff to considerable expense, but we know of no statute or rule of law, and none has been cited, which would have justified the court in awarding the damages sought. Some states by statute allow damages under similar circumstances, but that is a matter for the legislative assembly. The decree of the superior court is affirmed.

AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

en injunction that he should have also granted at the sont to relief by atarding him the outputs and lose of time so the commostion with the second manifespel court sets, the the atterney's fees. Acade & Co. v. Mardings bits the this care and otted to samper this contention. That outs marrly holds that equity, having jurisdies of a steep set of the full relief even though logal reseding my the steep and in fault relief even though logal reseding my the steep and in second of the second countries of the se

The defense of the second was we have been beenly versiony and put plaintiff to considerable engineer, but a through of the statute or rule of law, and none has by a city is thich weald never justified the court in anarcing the court in anarc

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superior court is affirmed.

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ALLIANCE OF AMERICA, a corporation, (plaintiff below),

Appellee,

.

HOME BANK & TRUST COMPANY, as trustee, under trust agreement No. 698, et al., Defendants.

THEODORE A. POSKA, conservator of the estate of Felicia Poszka, Insane, (Defendant and cross-complainant below),

Appellant. APPEAL FROM CIRCUIT
COURT, COCK COUNTY. .

287 I.A. 621²

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

August 1, 1935, Lithuanian Alliance of America, a corporation, filed a bill to foreclose a trust deed dated August 25, 1927, made by Home Bank & Trust Company, as trustee, securing an indebtedness of \$12,000. The complaint joined as defendants certain "unknown owners," who are described as persons claiming to be interested in the subject matter of the foreclosure "or in the real estate or some part or parts thereof as the owner or owners, holder or holders of the real estate." Thereafter,

February 9, 1934, pursuant to an order of court, Theodore A. Poska, conservator of the estate of Felicia Poszka, insane, obtained leave to become a party defendant to the bill, answered the complaint and filed a cross bill, to which the Lithuanian Alliance of America filed its general and special demurrer.

Subsequently the cross bill was amended, as was the general

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HOME BANK & TOURS IN STAR DECK trustee, under trust v.r. ement Mo. 698, 50 al.

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TO TOJEYT SEREO . A DO . A SHOULD THE the estate of Fellota Fosska.

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August 1, 1953, hithuspian (1919) of the S for a bus a real colored to the business and a first a business and the bu 25. 1927. ande by dome tonk A Frust onders to term of the rdefine of forman of 12, and . The common set of CONTRACTOR CONTRACTOR of the contract of the areserve asserting alajuse is it is a regarder at hoteometat of of the real actate or row that ac I nor odf 1 1 1 1 1 1 1 1 1 omerra, holder or when a the a l 1010 1131 0 Rebruary 9, 1934, pur u.m. to an ord by at the . . . and althought for as to and to mesagrames to become a party defendant to the :[1], the filed a cross bill, to hich ... Latherpay is a completified

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and special demurrer thereto and upon argument the court sustained the amended demurrer and dismissed the cross bill as amended for want of equity. Theodore A. Poska, as conservator, prosecuted an appeal to the Supreme court on the theory that a freehold was involved, and also questioned the constitutionality of the Torrens act, under which the real estate in question was registered. The Supreme court, however, holding that a freehold was not involved and that a cause cannot be brought directly to that court upon the ground that the validity of a statute was involved unless the record discloses that the question was presented to the trial court for decision and preserved for review, refused to take jurisdiction and transferred the cause to this court for determination. (Lithuanian Alliance v. Home Bank & Trust Co., 362 III. 439.)

It appears from the amended cross bill that Felicia Poszka was adjudged insane March 23, 1922, in the County court of Cook county, Illinois, and committed to the Kankakee State Hospital where she has been confined ever since, never having been restored to reason since her commitment. It is further alleged that March 23, 1922, and prior thereto the legal title to the real estate under foreclosure was vested in the incompetent person and Frank A. Poszka, her husband, as joint tenants, free from any incumbrance, as evidenced by certificate of title issued by the registrar of titles of Cook county under date of December 2, 1920. The cross bill further alleges that following the adjudication of insanity, a warranty deed dated April 17, 1922, bearing an acknowledgment dated April 18, 1922, and purporting to convey the title and interest of the incompetent person in said real estate to one Paul Poszka, was filed for record in the registrar's office in Cook county, Illinois, May 23, 1922, and that Felicia Poszka, the insane person, did not execute, acknowledge or deliver said warranty deed and did not and could not authorize or empower any person to act for her with reference thereto.

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It appears iron the same of a cold that call and was adjudged instant Saroh 72, 1980; In the fourty gone to the Lavin of ofer eather and or refinmer has aloudfil tytuses board or meed and rever , or i ever boatland and and sacrat office and said has the formal and officer to the transfer of the contract of under formologure was vested in the incompetent passen and drard A. Posska, her husbend, es joint t nm., I'r . as the dead red. as evidenced by a relationary of the a ... If the real trace of titles of Cook county and route i the think of one all doed deted april 17, 1922, U . i. o'ro . o'ro . o'ro . -mooni oil to jest the clil till till the popular till till sale of the call Tol 1911 1 30. Jakabel fur one of along the him of no me design record in the registrar's orlice in Code county, il rot, 'C.Y 25, 1922; and that Yelleis Possks, the income person, oil not execute. sommenledge or deliver maid warranty deer and die not and on ald not eserged comes to said and so to to as me reg was reweged to extremine

and that, if the deed bears her genuine signature, it was obtained by fraud.

It is further alleged that about November 14, 1924, Paul Peszka conveyed title to the premises to Home Bank & Trust Company. as trustee, under a trust agreement of that date, and that the beneficial owner under the agreement was Frank A. Poszka, husband of the incompetent person; that afterward, on or about August 25, 1927. Frank A. Poszka applied for a loan to the Lithuanian Alliance of America, who had actual notice and knowledge of the insanity and disability of Felicia Poszka, wife of the applicant; that the right. title and interest of the incompetent person in and to her share of the real estate is superior to the rights and interests of parties to this proceeding. The cross bill further alleged that said Felicia Poszka, insane, is seized in fee simple of an undivided one-half of said real estate, which is improved with a two-story brick store and flat building, commonly known as 3101 South Morgan street, and that Sophie Posska, who claims to be the owner of an undivided one-half interest, and certain tenants are in possession of said premises; that Lithuanian Alliance of America and others claim some interest in the real estate which constitutes a cloud upon the title of said incompetent person and that its claims should be adjudicated to be a cloud on the title and removed by degree of court. The cross bill concludes by praying for the following relief:

- (1) That the parts or shares belonging to cross-complainant and all other owners of said premises be settled and ascertained by the court:
- (2) That a partition of the premises be made between cross-complainant and all other persons who shall appear to be owners of or interested therein according to their respective rights and interests:
- (3) That commissioners be appointed to make a division and partition, or in case partition thereof cannot be made without prejudice to the owners that said premises be sold and the proceeds divided among the owners according to their respective interests;
- (4) That the warranty deed from the insane person to Paul Poszka, the trust deed and other subsequent conveyances be

and that; if the deed bears hat genuine tignsture, it was nathined by fraud.

services four? The complete to see the fore beyone advant wit that was est of their to successful fours a reban , sovers as openius tellan . . There was presented and return tonce fairthened . 18 tour supule to no busyrette such impared the supul and to 1987, Frank A. Foreka applied for a lean to to thiskenten llience bus your set and to aght Land has solion factor bad of the incluse to disability of Felicia Pessha, wife of the applicant; that the ri ht, to every and or boo at movery inesequent out to secretal bas efficiency asion, a lo abecause bas armis and or rotrous at otates that and eld the processing. The cross bit inthre and and soling sint of To lied-one to near to stanta as the stanta of an annant . salam ? bas are. After your sale in the several of the feet of the sale and th Serie and the terminal man is a continue to the series of Copile Pearles, who claims to be the sener of an undivides encolusing initiant, and derived temporal are in personal on order produces initially Litheanien Allene of America and others chert to the Allenes of the Control of th real estate which countitates a cloud upon "H" (1:16 of to incollbut we as at a last with and bisoda amials est tast bus neares tast on the title and removed by degree of court. The cross till multiby praying for the following velice:

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declared fraudulent and void as to the rights of cross-complainant.

The principal question for determination is whether a paramount or adverse title can be adjudicated in a foreclosure proceeding. It is urged by cross-complainant that unless the court determines her claim to a paramount or adverse title in this proceeding that the foreclosure decree will forever bar her It is a well settled rule of law. laid down by numerous decisions in this state, that where a gross bill is not germane to the original bill it is subject to demurrer. (People v. Fisher, 335 Ill. 406; Patterson v. Northern Trust Co., 231 Ill. 22; Smith v. Johnson, 321 Ill. 134; Dinamoor v. Rowe, 200 Ill. 555.) It is also well settled that questions of adverse or paramount title cannot be litigated in a suit to foreclose a mortgage. We so held in the recent case of Chap v. Lithuanian National Catholic Church of America, case No. 37884, not reported. In that case one Dalyrimple, a codefendant in the foreclosure proceeding, was served by publication predicated upon a false affidavit. Dalyrimple claimed an adverse or paramount title and sought to file an intervening petition asking to be relieved from the effect of the decree on the theory that his right to a paramount title had been adjudicated in the foreclosure proceeding. The court denied him leave to intervene. Upon appeal the decree was reversed and the cause remanded with directions to allow the petition and for further proceedings thereon, upon the theory that his rights had been adjudicated adversely to him pursuant to a false affidavit of publication; that he was not a proper party to the proceeding because he claimed an adverse or paramount title, which could not be determined in a foreclesure suit, and that he was entitled to be dismissed from the proceeding in accordance with the prayer of his petition and to try his title in another and separate proceeding. Numerous cases cited

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a renderfor at most otheresed not moltresp fagioning and equation to a resultable to man alist satests to impension and another said sandalymor-root of begin at al . Tarbevood out of the sound of the second of the second section of the second secon red and anyway. List o took caprologue out took anthropout with rights. It is well sottled rule of last down by rungrous of onestra Jon si file acors a erode that estate alai at ampialoch the original bill it to subject to de arrer. (Supple v.) isness. 335 III. 406; Pattoreon v. Martnorn Tree to., 231 1.1. 22; mint v. Johnson: 321 [11. 136; Minamour v. Rows, 2 % 11. 555.) 11 12 offit incomerat to sections to annihump take balates flow onla cannot be litigated in a suit to foreques a mortgage. e co held in the recent care with v. if then it is it is a constant with of imerica, came Me. 37884, not reported. In that cast one Dalyriagic, a codefeatent in the foredismant gros ecing, see served by sublication prodicated upon a fall a villavit. . algrimple of land gridatelefol to diki o. Joyasa ban aliki invontana to agreeba na add no percent and to teally one mer a people of of nathan notation theory that his right to a paramount title her ween a justorted in the foreclosure proceeding. The court d mist him lanve to intervene. Upon appeal the decree one reverser any the remembed santh secre this so one maith by out walle of emitourib Milw thereon, upon the theory that his rights had be nortadion bec adversely to him pursuant to a talk a while of publication; that he was not a proper party in the propertie by and an and an edverse or persucunt title, which could not be determined in a fare-- my sis with and that he wis untilized to be it mister . The pine cooling in accordance with the prayer of his position and to try his title in another and coparate proc eding. Pumerous cases ofted

therein and in appellee's brief are to the same effect, and the rule is well established in this state that where a defendant to a bill for the foreclosure of a mortgage or trust doed sets forth in his enswer that he has title to the property which is paramount and superior to that of a mortgagor and derived independently of the mortgager, such defendant must be dismissed from the suit. In such case the court is without jurisdiction to pass upon and determine the validity of the defendant's claim to a paramount title. (Bezarth v. Landers, 113 Ill. 181; Whitaker v. Irons, 300 Ill. 254; Gage v. Ferry, 93 Ill. 176; Ennis v. Wolff, 194 Ill. 420. and cases cited therein.) It has even been held that the rule is applicable where the chancellor is of the opinion that such claim of prior or superior title is without substantial foundation. (Gage v. Perry, 93 Ill. 176; Bozarth v. Landers, 113 Ill. 181.) The only proper parties to a bill of foreclosure are the mortgagor. the mortgagee and those whose estates and liens have intervened since the execution and recording of the mortgage. (Shitaker v. Irons, 300 Ill. 254; Gage v. Perry, 93 Ill. 1960)

In Chap v. Lithuanian National Catholic Church of America, supra, Dalyrimple was made a party defendant, and served. He sought to be dismissed from the proceeding so as not to have his claim of a paramount title adjudicated in the foreclosure proceeding, and we held that he was not a proper party and was entitled to be dismissed so that he might have his rights adjudicated in a separate proceeding. In the instant case cross-complainant was not made a party to the original proceeding but intervened and obtained leave of court to file her answer and cross bill, and she seeks in this foreclosure proceeding to have her claim of a paramount title adjudicated. Upon the same principle that was laid down in the Chap v. Lithuanian National Catholic Church of America and other cases cited, we are constrained to hold that the insane person's

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In Chap v. Lithusnian Hations! Series of Notes. See Postificated Dalyringle was made a party of condept. And from the proposition of the Lot of the little editation of the Lot of the Lot of the little editation of the Lot of the Lot of the Lot of the little editation of the Lot of the

claim of a paramount or superior title cannot be determined in this foreclosure proceeding and that her cross bill was properly dismissed on demurrer for want of jurisdiction. That, however, does not defeat or affect her right to file a separate proceeding and have her claim of a paramount title heard and adjudicated in another suit.

It is next urged that the chanceller's ruling on the demurrer was based largely on the binding effect of registrations of title under the Land Titles act. Appellant argues that a deed made by a lunatic, being void, any subsequent certificates of title based thereon are likewise void, even as to innocent purchasers. In view of our conclusion that the court had no jurisdiction to try a paramount title in this proceeding, we refrain from passing on this point, especially in view of the fact that it will undoubtedly constitute one of the principal arguments to support cross-complainant's claim of paramount title in another proceeding.

of the Torrens act. This question was disposed of by the Supreme court in Lithuanian Alliance v. Home Bank & Trust Co., 362 Ill. 439.

Finding no reversible error, the decree of the Superior court is affirmed.

AFFIRMED

Sullivan, P. J., and Scanlan, J., concur.

claim of a purament or superior sith common by dear, incd in this foreclosure proces ing and that her arona till us, properly disulated on domarrer for went of jurishings, "heri, horsvor, does not defeat or offeet her right to file a a parate processing, and have her claim of a ceramount title never of adjusticated in another suit.

It is next urged that the chanceller's culing on the decurrer was based largely on the binding effect of registrations of title under the band fitter act. Appellant argues that a deed male by a lumatio, being void, eny nubsequent dentification of title or set thereon are likewise void, even as to immediately over a first of the conclusion that the nourt had no jurishing to ory a presence of our conclusion that the nourt had no jurishing on this point, ment title in this proceeding, we refrein from bancing on this point, especially in view of the fact that it his and wheely a metalous of the principal arguments to an of cross-surfain or a slain of paramount title in suctaer proceeding.

The only other point raised relates to the occubillusionality of the Torrens sot. This question and deposed as by the uprove court in Lithusnian bilitypes v. Sept back to Frank to Little 111. 631.

Finding no reversible error, the decree of the unsectored or the affined.

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Sallivan, P. J., and Jeanlan, J., senous.

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WILLIAM M. RICHARDS,
Appellee,

TS.

HARRY KAPLAN.

Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

287 I.A. 6213

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An appeal by defendant from a judgment entered against him upon a verdict of a jury in an action of forcible dentry and detainer finding him guilty of unlawfully withholding the premises in question from plaintiff. The premises involved are Apartment 1, 2142 N. Kedzie Avenue, Chicago, Cook County, Illinois. Defendant filed a plea of not guilty and demanded a jury trial.

Defendant offered no evidence. From plaintiff's evidence the following facts appear: On January 3, 1925, defendant and his wife, being the owners of certain property (a part of which is involved herein), conveyed the same to Foreman Trust & Savings Bank as trustee. On the same date the Bank entered into a trust agreement to hold the property for the benefit of defendant, Herman M. Lipman and Benjamin E. Cohen. Thereafter Cohen assigned his interest to defendant and Lipman, and on December 12, 1929, defendant and Lipman assigned their interests to Ella I. Lightfoot, who, on October 5, 1931, assigned her interest to plaintiff. On February 2, 1925, the Bank, as trustee, executed a trust deed securing a first mortgage loan on the property, and in October, 1930, a bill was filed to foreclose the trust deed. On March 22, 1932, a decree was entered finding that there was due complainant the sum of \$105,452.48, ordering a sale of the property to satisfy that amount, and continuing the receiver in possession to manage and operate the property and collect the rents. On March 26, 1932, at a master's sale held pursuant to the decree, the property was sold to Frances

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WILLIAM M. AIGHADS.

HARRY L.PLAN.

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An appeal by lettendark from this cont decide to be a defined at real for a first energy of the state of the state of the real real for the real real for the real first the rea finding him puilty of unlawfulry withwolding the or ince in coestion from plaintiff. The createse icrolved are up rement to 142 ... etcin Avenue, Unicago, Cook Count, Illibois, Before at 1 1 1 2 2 1 1 1 1 not guilty and desamble a jury trial.

Defendant offered no evidence, From no evidence to the service the following facts appear: on January J. 1975, defealed at mit of wire, being the owners of certain property as rt or ofen it involved herein), conveyed the can to where it in a conveyed the as trustee. On the same date that I am er for I into a fresh of the ment to hold the property for a core its of all the time. Lipman and Benjavin V. Coren. Frequently point and Benjavin V. grad to defendant and adjament, to the best of the test of the tes and Lipman assigned that a first standard in the time of the contract the October 5, 1931, assimed her intervet of a facility of the control 2, 1925, the rank, whiterstor, expected a true (wit of rid ... Tirst mortgage loan or the erepress, we him her with a first was filed to forcolose the farm need. I have no besit as cros was entered the distribute term as the co. of the transfer of \$105,452.48, ordering a sale of the property of the fact. and continuing the receiver in morsescion to he is a continuing property and collect the rests. On warch 21, 1939, the aster's

sale held parsuant to the ferre, the runarty was mild to rindes

M. Blakely for \$18,000. On June 25, 1932, plaintiff redeemed the property from the sale. On May 25, 1932, the Bank conveyed the property by its trustee's deed to plaintiff. The apartment in question is in an apartment building located on a part of that property. In October, 1929, defendant entered into a written lease with the Bank for the apartment at a monthly rental of \$100. It is admitted that since the expiration of the lease defendant has continued in possession of the apartment and still is in possession, without any new agreement. The evidence conclusively shows that he has not paid any rent for the apartment since February, 1930.

Upon the oral argument of the present appeal, the members of the court, impressed with the fact that defendant had paid no rent for the apartment since February, 1930, inquired of defendant's counsel what equitable defense, if any, defendant had to plaintiff's action, to which inquiry counsel replied that defendant's attitude was to defeat, if possible, any suit for possession of the apartment that plaintiff might bring against him.

Section 14 of the Landlord and Tenant Act (III. State Bar. Stats. 1935, ch. 80, par. 14) provides that the grantees of any demised lands, tenements, rents or other hereditaments, or of the reversion thereof, the assignees of the lessor of any demise, and the heirs and personal representatives of the lessor, grantee or assignee, shall have the same remedies by entry, action or otherwise, for the nonperformance of any agreement in the lease, or for the recovery of any rent, or for the doing of any waste or other cause of forfeiture, as their grantor or lessor might have had if such reversion had remained in him. In West Side Trust and Savings Bank v. Lopoten, 358 Ill. 631, 638-9, the court stated:

"The devisee or grantee of a lessor, by the express provisions of section 14 of the Landlord and Tenant act, may maintain an action of forcible detainer in his own name. The right of the respective plaintiffs in the illustrative cases cited presumably vested in those who had never been in the actual possession of the

M. Blakely for \$13,000. In Two E5, 1670, plaintill redeele une property from the sale. On tay 25, 1 ft, the Leak conveyed the property by its trustee's deed of plaintiff. The about the integration is in an about out but the lacted of part of the property. In October, 1899, different at a satisfied the Berk for the apartment at a satisfied the berk for the apartment at a satisfied of the since the explosion of the sential test in percession of the apartment of the information. The senting all percession, without any new agree int. In open explose concentrations, and the major the apartment of the spartment of the lacted that of the apartment of the spartment of the lacted that all percession, without any new agree int. In open expertment of the apartment of the spartment of the lacted that the apartment of the apartment of the spartment, left.

Upon the oral argument of the present above 1, the meanors of the court, impressed with and fact that for the apartment rance fearthry, incoming an infermal same coursel what equitable definer, if any, desented that the infermal action, to which inquiry counsel replies and defeat, if possible, any sait or possession of the abstract that plaintiff might bring against him.

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State. 1935, ca. 30, rar. 14) provides must the grothest of my maised lands, tenements, remits of their repredictances, of if of reversion thereof, the assignees of the issuer of an domine, of the heirs and personal representatives of the interpolation of the color of their color of their colors of their colors. In the color of their color of their color of the color of the

[&]quot;The devise or trante of a lactor, r the a reput fine and section 14 of the handhord and senant act, my nebut the an action of foreible detainer in his evenuese. The right of the plaintiffs in the lilustrative cases ofted presured to vested in those who had never been in the actual pass trien of the

premises. The manifest legislative intent disclosed by section 2 is that only in cases brought under the first clause is the action primarily one for re-possession, and that the remedy afforded by the remaining clauses is not restricted to those who were originally in possession of the land but also extends to the persons presently entitled to the possession after a demand in writing."

Under the evidence and the law, therefore, plaintiff succeeded to the rights of defendant's lessor, Foreman Trust and Savings Bank.

On January 18, 1933, plaintiff commenced a forcible detainer suit against defendant for the possession of the premises, and on March 28, 1933, obtained judgment. Defendant appealed to this court (Richards v. Kaplan, 274 Ill. App. 655, Abst.) and we reversed the judgment and remanded the cause for a new trial upon the ground that the evidence did not show that a demand in writing for the possession of the premises was ever made and served on the defendant as required by the statute, and upon the further ground that plaintiff had failed to prove that defendant was a "grantor in possession" of the premises described in the complaint, within the meaning of clause Sixth of Section 2 of the Forcible Entry and Detainer Act. From our opinion it appears that it was agreed by the parties that clause Sixth governed that appeal. After that judgment had been reversed and the cause remanded plaintiff retained new counsel, the suit in the Municipal court was nonsuited upon motion of plaintiff. and after plaintiff had served on defendant a demand for immediate possession of the premises the instant proceedings were commenced. The trial court refused to permit defendant to offer in evidence the transcript of the record filed in this court in the former proceeding, the opinion of this court therein, and the mandate, and defendant contends, if we understand his position correctly, that our judgment in the former proceeding is res judicata of the present suit. There is no merit in this contention. In the former case we did not finally adjudicate the rights of the parties but merely reversed the cause for a new trial. Plaintiff, in that proceeding, was, apparently, premises. The manifest Leginistive in that here we by second is that only in cases brought under the first cluster is the ention primarily one for responsation, and that the remaining clauses is not restricted to thore was were originally in possession of the land but of a second or the reserving of entitled to the possession after a down in writing."

Under the evidence and the law, therefore, push that the rights of defendant's lesson, Egreman Trust and having a wank.

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cause for a new trial. Plaintiff, is test recording, tas, aroundly

not informed that defendant had executed a lease as a tenant for the apartment, and therefore proceeded on the theory of "grantor in possession." After the cause was remanded the existence of the said lease became known to plaintiff's new counsel. The former preceding was then nonsuited and the instant one commenced. Here plaintiff bases his right to possession under clauses Second and Fourth of Section 2 of the Act and Section 14 of the Landlord and Tenant Act. To admit the transcript, opinion and mandate would serve no useful purpose and would only tend to confuse the jury.

As plaintiff brings this action under clauses Second and Fourth of Section 2 of the Act and Section 14 of the Landlord and Tenant Act, it is unnecessary for us to notice several points raised by defendant that are based upon the assumption that plaintiff predicates his right to possession under clause Sixth of Section 2 of the Act.

Defendant argues that the evidence shows that after February, 1930, he paid his rent, that such holding over made him a year to year tenant, and cites Goldsborough v. Gable, 140 Ill. 269, and Weiss v. Danilezik, 262 Ill. App. 551, in support of his contention that where a tenant remains in possession after the expiration of the terms described in the lease without any new contract with the landlord it is optional with the landlord to treat him as a trespasser or to waive the wrong and treat him as a tenant, and that by accepting the payment of rent thereafter the landlord makes his election and the tenant becomes a tenant of the premises from year to year, upon the same terms and subject to the same rent as is provided in the lease. The instant contention is based upon the assumption that defendant paid his rent to H. O. Stone & Company subsequent to February, 1930. An examination of the testimony of Gerald E. Riley, upon which defendant relies in support of his contention, satisfies us that the witness's statement that denot informed that defendant had executed large as a tenart for the apartment, and therefore proceeded of the tradity of "granter in possession." After the cause was remaided the discrete of the cald lease became known to plaintiff over conduct. The former preceding was then nonsuited and the instant one commenced. Here plaintiff bases his right to bushes for under of assaired and south of Section 2 of the act and section is a section of the transmitter. I administration and remains and remains and remains and remains a first the transmitt, doing a design and remains the transmitter of the transm

As plaintiff brings this action about out of user second and Fourth of Section 2 of the Act and Section 16 of the Landlord and Tenant Act, it is unnecessary for as to relice exercise prints raised by defendant that are bus 4 apon 1 e nos. Then that plaintiff predicates his right to possession water accuse Sixth of Section 2 of the Act.

Defendant armans that the cyf come of the witer witer ery, 1930, he paid his rent, that sure not ling over made him a year to year tenant, and cites . oldshor any v. delte, 19 111. 205, 16 Weiss v. Danilowik, 262 Ill. Age. 80, in our out of the contention that where a teman remains in presention for the certainstion the terms described in the loase without any new contract with the landlord it is optional with the landlord to treat aid as a trespasser or to waive the wrone and treat if as a transfer the transfer to by accepting the payment of rest theresiter and lard sames his election and the tempet because a tell at of a core isce from year to year, upon the case term a a band of the rent as is provided in the lease. The first unt content in it lead unon the assumption that defendent paid his went to f. . Stan e Councily subsequent to Rebruszy, 1.3. An examination of the testinony of Cerald B. ailey, upon which dealers and in it is out out of mir contention, said fice to the circust of and list such

fendant paid his rent after that date is based not upon any knowledge of the witness but upon his suppositions and conclusions. The jury were fully justified in finding from the testimony of Margaret Arlington, plaintiff and Henry S. Reichard that defendant did not pay any rent after February, 1930. Defendant had full opportunity to prove such payment if he made it. He did not do so.

"A tenancy from year to year cannot be inferred from the mere fact of a holding over by the tenant; the landlord must in some manner recognize the tenancy. The acquiescence of the landlord in the holding over may, however, be inferred from the circumstances, the question being one of fact. The acceptance of rent in accordance with the terms of the lease is evidence of such recognition, but a mere demand for rent which is not complied with is not conclusive of consent. The mere fact that the landlord takes no steps after the lease expires by its own terms to regain the possession is not an act from which the inference of the new tenancy may be drawn, unless the landlord has permitted the occupancy to continue for such a length of time as to imply assent." (35 C. J. 1103.)

"A tenancy from year to year can not be inferred from the mere fact of holding over; the landlord must, in some manner, recognize the tenancy. If, after the lease expired, the landlord should agree upon a term, or receive rents, or recognize the party holding over as his tenant, these and kindred facts might be regarded as facts from which a tenancy might be created. But the mere fact that the landlord takes no steps, after the lease expires by its own terms, to regain the possession, can not be regarded as an act from which an inference of a new tenancy could be drawn." (Gairo & St. L. R. R. Co. v. Wiggins Ferry Co., 82 Ill. 230, 233.)

"In Weber v. Powers, 213 Ill. 370, 382, it is said: Where a tenant for a year or years holds over after the expiration of his lease, without having made any new arrangement with his landlord under which such holding over takes place, the landlord, at his election, may treat the tenant as a trespasser, or as a tenant for another year, upon the same terms as in the original lease, and this though the tenant has no intention of holding over for a year, or of paying the same rent. The law fixes the tenant's liability for holding over, independent of his intention. The legal presumption of a renewal from the holding over cannot be rebutted by proof of a contrary intention on the part of the tenant alone. (Clinton Wire Cloth Co. v. Gardner, 99 Ill. 151.) The right of election as to whether the tenant, remaining in possession after the expiration of the lease, is holding over upon the same terms as in the original lease is a right, which belongs to the landlord, and not to the It is the landlord alone, whose intention on the subject is to be ascertained, as it is he alone, who may elect to treat the tenant as holding over under the terms of the old lease. (Keegan v. Kinnare, 123 Ill. 280.)" (Weiss v. Danilczik, 262 Ill. App. 551, 556.)

The argument of defendant that plaintiff, by lapse of time, is precluded from electing to treat defendant as a trespasser, is without fendant paid his rent siter trace outs is bused not upon any least-edge of the witness but upon his suppositions and oned dings. The jury were fully justified in finding from the testinony of dargeret Artington, plaintiff and entry a holoward that defendant tid not pay any rent after lebruary, led. Defend and full oppositative to prove such payment if he made it. He did not do so.

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"A tenney from year to rear a new how his restriction to mere fact of modding over; the ladders of, as some restriction recognize the tenancy. If, aster the lease of the following the content of another compone a term, or receive rous, or test, in the last power as his tenant, these and atherd one of the last power as the last and takes and the last of the last of the restriction of the last power of the last content of the rouse of the content of the garded as an act from which an inferior of the last from the content of the content of the last from the content of the content

"In Weber v. rowers, 213 11. "7, ".", it is the 'Nibre a tenset for a year or years ... des over the a said it is the clar of the under which such holding ever to a sace, a clardfor, to bis under which such holding ever to a sace, a clardfor, to bis another year, about the ten nt as a treatment, or as such the same tense that the under the same tense to the contract of paying the same rent. The tense to the contract for holding over, independent of his intention. The is all the contract of near treatment of his intention. The is all the contract of near the contract of the same to the contract of the same to the contract of the same to be a said the contract of the contract of the contract of the contract of the same to be acceptained, as it is not the contract of the same as noting over under the cents of the contract of the same tas noting over under the cents of the contract of

The argument of defendant our United will', by large of time, to procluded from electing to treat defendant as a transacror, is itsout merit. (See Cairo & St. L. R. R. Co. v. Wiggins Ferry Co., supra.)

Moreover, the record conclusively shows that plaintiff has endeavored for a number of years to dispossess defendant and that the latter has retained possession of the apartment not because of any equitable right he has, but solely because of the ingenuity of his counsel.

In the instant case one of the interrogatories filed by plaintiff reads: "With respect to this apartment, were you ever a tenant of William M. Richards?" to which defendant answered, "No." Counsel for defendant, in his opening statement to the jury, stated that the evidence would show that plaintiff was not defendant's landlord. As defendant denies the fact of tenancy, forcible detainer would lie against him even though there had been no notice to quit or demand for possession made before beginning the action. (See Gentle v. Butler, 278 Ill. App. 371, 375-6; Tole v. Tole, 149 Ill. App. 311, 315-6.)

Defendant contends that the court erred in refusing to give instructions tendered by him and in giving instructions tendered by plaintiff. After a consideration of the said instructions we have reached the conclusion that there is no merit in the contention.

Neither in the first proceeding nor in the instant one did defendant offer any evidence or interpose any equitable defense. As plaintiff strenuously argues, defendant seems to rely solely upon the ability of his counsel to find technical defects in the proceedings by means of which defendant may retain possession of another man's property without paying any rent for the same. Defendant's attitude does not appeal to our sense of justice.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

In the instant case one of the inters. Then I well by plaintiff reads: "With respect to the arms., are parent a tenart of willish a distinct "to waiter estimate answered, "No." Councel for defendant, in his opening, a test of that the evidence with show the part will read of and not defendant's lendlord. As defendant showers, and a count trained, foreible detainer would lie against him evaluation of the countries to quit or detained to possessing and a countries one of the to notice to quit or detained, such as possessing and a countries of the section. (See Gentle v. such et., 27: 111. And. 149 111. Apr. 31; 31-6.)

Defendant nontends that the court arm A to refugure to rive instructions tendered by him and it into the letter to the reduction of the letter a consideration of the letter the we have reached the conclusion that there is no origin the conclusion that

Meither in the lifet error is, or is one listed of elleder defendent office any evidence of is the order of elleders.

As plaintiff streamously armes, left out seems to rely solety worthe ability of his course) to itself of left to rely of the course of which is some way retain nossession of anchorer man's property without paying any rule for the suc. Teleproperty without paying any rule for the suc. Teleproperty and appears of the collection of the collection.

The judgment of the numicinal court of Cilcaus is affired.

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38611

JAME ANNE SLAUGHTER, by H. M. Slaughter, her father and next friend, Appellee,

v .

EXPOSITION GATEWAY PARKING CORPORATION, a corporation, et al.,

Defendants.

EXPOSITION GATEWAY PARKING CORPORATION, a corporation, Appellant.

477

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

287 I.A. 6214

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, by her next friend, sued defendants, Exposition Gateway Parking Corporation, a corporation, Joel Johnson, Charles Fowell and Mabel Powell, in case. The only defendant served was Exposition Gateway Parking Corporation, a corporation, hereinafter called defendant. A jury returned a verdict finding defendant guilty and assessing plaintiff's damages in the sum of \$40,000. Defendant appeals to reverse a judgment entered upon the verdict.

The first count of plaintiff's declaration charges, in substance, that plaintiff, on August 11, 1933, was a pedestrian on Columbus Drive, at or near the 18th street entrance of the Century of Progress Exposition Grounds, Chicago; that she was then and there and at all times in the exercise of due care and caution for her own safety; that defendant and Joel Johnson were then and there driving, operating and managing a certain motor vehicle in a northerly direction on said drive and that it was the duty of said defendants while driving, operating and managing the motor vehicle

JANE ANNE SLAUCHTER, BY L. M. blaughter, her facher and next friend,

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EAPOSITE M J. MARY PARKING CORPORATION, et al., Defendants.

NXPOSITION GATERY PARKING COMPORATION, a corporation, Avocilant.

THOUSE A LECTA

ME. JUTTICH POLYMAN DELIVERED TWEET THE WOLF OF THE CO.

Flaintiff, by her next friend, sued derendants, Exposition Gateway Parking Corporation, a corporation, Joel Johnson, Charles Fowell and Mabel Powell, in case. The only defendent served was Exposition Gateway Parking Corporation, a corporation, persinafter called defendent. A jury returned a ver ist iinding defendent guilty and a seessing plaintiff's denages in the sum of PAO, NO. Defendent appeals to reverse a judament interfer upon the verdict.

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to do so with due care and caution, but that defendants so carelessly, recklessly and negligently drove, operated and managed the said motor vehicle that the same ran into, against and upon plaintiff, causing injury to her, etc. The second count, after alleging due care and caution on the part of plaintiff, charges, in substance, that defendant was driving a certain motor vehicle over and upon Columbus Drive by and through its agent, employee or servant, Joel Johnson, who was then and there acting within the scope of his employment, and that defendent, through its said agent, etc., so carelessly, recklessly and negligently drove, operated and managed the automobile that it ran into, against and upon plaintiff, causing injury to her, stc. The third count was directed against defendant Johnson only. Defendant filed a plea of general issue and a special plea in which it averred that at the time of the committing of the grievances laid to its charge in the declaration defendant did not own, control, manage or operate the automobile as alleged, "nor was the person operating the automobile as alleged by plaintiff in the employ of or subject to any direction or supervision of this defendant and was not engaged in the furtherance of any business for this defend-Plaintiff filed a replication to the special plea. ant."

Defendant offered no evidence but tendered a written motion for an instructed verdict of not guilty, which was denied. No point is raised as to the pleadings. Defendant admits that plaintiff was very seriously injured, and does not question the amount of the verdict.

Defendant contends that the trial court should have allowed defendant's motion for a directed verdict because the uncontradicted evidence shows "that Joel Johnson, the colored porter, in the general employ of the defendant, was not at the time of the occurrence of this accident engaged in the master's business, since he was at that time and place acting outside of the scope of his employment. In

desert a war and the the table of object leady, c :kl. roll, -a maintain of a sell a and motor variation that are seen a said and an on the tiff, couring injury to by the time of the contract of the con our oure and on them on the grant of the gra to the descent the contract the base of the base of the base of the contract the co and the contraction of the contr vent, Joan John one a term of the line of the Land of his employer nt, and that a fend no, the a this a the a so carelesely, reckies ly entropies well above, by the control of the automobile that it ran late, a fact and non limit eliconomic Johnson only. Defendant file, a gla c. , a c. i a plea in which it averrae that at our tice or the could in gricvances leid to its abange in in a little in an are in all alot own, control, measage or operate the armorale and large and the person operating the enteresth. - in good of the fire the tunbrel a sid: To not diverger to be its till you of teafure to to yourse and was not engaged in the continuous of any butin the little of and-

befordent offer a no evidence but ten are a solita mation for an instructed variet of nos wiley, which a conider as to the pleadings. In all conidering the training very seriously injured, are so that are a conidered.

Plaintiff filet a v pliceview to the optoi 1 ol m.

Defendant's motion for a direct of y for body to the the theory of that for I dollars, the color prove the defendant, we not the defendant, we not the defendant, we not the defendant of the master's but here the color prove the theory of the defendant, we not the section of the master's but here the color of the colors of t

order to determine whether or not Joel Johnson was acting in or outside the scope of his employment, reference need be had to the evidence of two witnesses only - Truman H. Miner, an officer of the defendant corporation and Joel Johnson, the driver of the automobile." It may be conceded that in determining the instant contention only the testimony of Miner and Johnson need be considered. Both witnesses were called by plaintiff, under section 60 of the Practice act. Truman H. Miner is an attorney at law, practicing at the Chicago bar, but at the time in question was an officer and manager of defendant corporation. Defendant contends that Johnson was not a party to the suit because he was not served with summons; that when plaintiff called him as a witness she vouched for his testimony and his evidence as to the nature and scope of his employment is binding on plaintiff. Assuming, for the purposes of this case, that Johnson was not a party to the action, nevertheless, plaintiff was not bound by his testimony. (See Chance v. Kinsella, 310 Ill. 515, 523. See also Kovell v. North Roseland Motor Sales, 275 Ill. App. 566 [certiorari denied by the Supreme court, id. xiii], and cases therein cited.) Johnson, a colored boy, had just completed his first year in high school at the time of the accident. He was employed by Miner early in July. The accident happened August 11, 1933, but Miner retained him in the employ of defendant until he voluntarily left, about September 18, to again enter school. Miner testified that he hired Johnson to act as porter on the lot; "he was a watchman on the lot, to see that no cars were stolen, mainly; that was his main job. The next job was to keep the lot cleaned up, keep the papers and the tin cans and lunch boxes cleaned up, and burned up or thrown away; and keep the parking office clean. That's what he was hired for and those were his duties. He was told never to drive any cars for

order to determine whether or now John on un actual in or outside the scope of his employment, refrance weed be not to the evidence of two dimesses only - Frunsh ". Ther, an or ther of the defendent corporation and Joel Cohurch, the differ of the It may be conceded the in a terminan the instant ".olidemejus contention only the testimony of Miner and Johnson need be conoldered. Both witnesses were called by plaintiff, under action 60 of the Fractice act. Trumen H. Miner is an atlaney at law, practicing at the Chicago bar, but " the vine in westion was en c fileer and manager of defendant corper filen. Difendent and tends that Johnson was not a yearly to the such because live was not served with summons; that when plantailly fills bin a titless she vouched for his test nony and his 7' and a control in turd and good of his employment is binding on claiming. . Country, for the purposes of this care, that Johnson was not a perty to the action, nevertholess, plaintiff we not bound by his testimony. (See Chence v. Kinsella, 51 215. 517, 841. See al o Kovell v. North Roseland Meter Sales, WY 11. 10. 506 [certiorer] denied by the upreme court, id. miii], and cases therein cited.) Johnson, a salared boy, he just complete it is first pers in his school at the time of he pattont. . to amployed by increarly in July. The alcident harroned ugost 11, 194, but him withined him in the employ of definient until he volentaril lait, about September 13, to again onter sehool. Minew testified that a hired Johnson to met an purter on the lot; "he were a wetamen on the lot, to see that no care were stolen, meinly; he was his main job. The next job was to map the let ale not up, we pothe new or and the tim cans and lunch bonce cleaned with turn dum or Trown sand and keep the parking of itse class. Thete has himed for and those were his duties. Le a told n v . . . ive any a re for

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customers:" that at the time he employed Johnson he told him not to drive cars and repeated that direction to him many times. Johnson testified that his duties were to clean the parking lot and to direct the "customers" where to park; that he did not have anything to do with the driving of automobiles, that Miner had instructed him not to drive them, and when he drove the Powell automobile upon the occasion in question he knew that he did not have any right to drive it. If this testimony of Miner and Johnson. which upon/defendant is forced to rely in support of its contention, were all the evidence in the case as to the nature and scope of the employment of Johnson, there would be merit in defendant's position, but plaintiff succeeded in eliciting from Miner and Johnson, hostile witnesses, facts and circumstances that, in our judgment, clearly rebut the theory of fact of defendant as to the nature and scope of Johnson's work. Defendant employed a number of white boys, and Miner admitted that they were allowed to solicit business in front of the parking lot of defendant; that if parties in automobiles, when they stopped in front of defendant's parking lot, would not immediately drive into the lot, these boys would then get on the automobiles and accompany the parties until they reached an entrance to the Fair. whereupon the boys would give a receipt to the parties and bring the automobiles back to the parking lot; that that happened "quite often." "nearly every day, but with no authority assumed on the part of the Exposition Gateway Parking Corporation." But Miner finally conceded that the white boys "drove cars with my knowledge Colored people patronized defendant's lot and and consent." Johnson was the only colored boy employed by defendant. testified that he "drove cars back from the World's Fair to the parking lot a great many times." "pretty nearly every day." appears that he had parking tickets in his possession and he gave one to the Powells, the owners of the car in question, after they

mi. It is the time would me and the that ":eromo:suo was and the care out research tand - thecor but ares sying of ton The trait of the duties at the beitises mornfol and to direct the "customate" white or or it is the of him enything to do with the criting or an energy it. instructed him no. to drive sharp and and re in the all automobile upon the occusion in testion he are the die die att att. nave any right to day ve it. If this that the or it over or sign or upon/defendant is forced to rely in support of its constant, ore all the evidence in the case on to kine neutro end out of the car ployment of Johnson, there suld it mails in so take the playment but plaintiff succeeded in clicitary from Miner a Waler ... in . i e witnesses, facto and circumstance into a our in a.m., i le rebut the theory of fact of secondants as to the mittee and age of John on's lork. Defendant sugleyed amb or of the time, Miner admitted that they were allowed to all the fact and of the parking lot of fendency that it permit in a smoulder, when they stopped in front of determined a stant of horizonth immediately drive into the lot, these pay our out till automobiles and accompany the parties until they are nonto the Fair, whereupen the boys ould discuss to the sea and bring the automobile based uslingmotus off anird bas "quite often," "mearly every day, it is be seen " "mearly every day, it the part of the Exposition Gateway a right dorps to the Tac finally conceded that the white boy prove a real to low ledge Colored people patrentace to an art in the and comment. Johnson was the only colored bog washoyed by me and all o. The low sould mout word drag syorba and fail beilthest parking lot a great meny times," "pretty newly av day. argents that he had parking tickets in his poster. Low har land one to the Powelle, the owners of the our in question, fter

got out of their automobile at the Fair entrance. Miner admitted that a few days after he employed Johnson he learned from the white boys that Johnson was riding on cars to the entrances of the Fair and then driving the cars back to the lot; that on subsequent occasions prior to the accident he learned that Johnson was continuing that practice. He testified that whenever he was told that Johnson was driving cars he would tell him that he must not do that, that he must not touch the cars; that he told him this a dozen different times, "a good many times;" that "Johnson was never allowed to go off the lot, so far as his instructions were concerned." After the accident Johnson, upon returning to the parking lot, told Miner all about the accident, but Miner kept him in the employ of defendant until he voluntarily left, about the middle of September, although Miner admitted that he knew that Johnson, after the accident, was still driving cars for "oustomers." Miner testified that on the day in question he saw Johnson "go out and talk to the colored people [Powells] in the car" and saw him get on the running board; that he expected the colored people and Johnson would go around 24th street to the rear of the lot where they could enter and park, that when he saw them go "toward the 23rd Street gate" he assumed that Johnson was going to that gate; that Johnson, accompanied by several South Park officers, came back in about an hour to the parking lot in the Powell automobile, which was then parked on the lot, where it remained for several days; that Johnson upon his return told him that he hit somebody. Defendant argues that the police officers drove the car back to the lot, but Johnson finally admitted that he drove the car back to the lot. He also testified that upon his return to the let he told Miner "what happened." Although Miner testified that he had told Johnson not to handle cars, nevertheless, it is apparent that he permitted him to solicit the business of the Powells, and he made no effort

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to prevent him from accompanying the Powells as they drove away from the front of the premises of defendant.

Defendant argues that their business was only receiving cars for parking, but the evidence shows clearly that when it was necessary, to secure the patronage of automobilists, defendant offered them the additional service of delivery of the car from the Fair entrance to the lot. Indeed Miner admitted that this was true as to the services rendered by the white boys. It is evident that defendant could not have secured any considerable number of automobilists to park with it if they were forced to walk from its lot to the various entrances of the Fair located north of the lot. The Powells are colored people. Members of that race patronized defendant's lot, and the jury might reasonably infer from the evidence that Miner thought that Johnson was more likely to secure the patronage of colored people than the white boys. It is somewhat significant that defendant did not see fit to call any of the white boys that were employed in its service.

In determining whether a servant is acting within the scope of his employment all of the facts and circumstances surrounding his relationship with his employer must be considered. The jury were fully justified in finding that Johnson, notwithstanding the alleged instructions he received from Miner, was allowed by Miner to solicit patronage in the same way that the white boys did, and that it was part of the regular service given patrons by defendant to have the boys, including Johnson, drive cars from the parking lot to the entrances of the Fair; and the jury were also justified in finding that defendant, knowing the services that Johnson was rendering to its patrons, received the benefit of the business he obtained. Johnson testified that he did not know the Powells, and there is no contention that he was engaged on a personal errand when he accompanied them to the 23d street entrance. It would be a strange

to prevent him from ecompanying the Fowells as they drove nergine from the front of the premises of defendent.

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accompanied them to the DSG street cutrance.

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rule of law if defendant, under the facts, could escape responsibility for the act of Johnson merely by showing that it often instructed him not to drive the cars. The facts in the instant case illustrate the wisdom of the old adage that "actions speak louder than words." Johnson was not discharged after he had injured plaintiff, although Winer knew that he was still disregarding the alleged instructions, and he left the employ of defendant of his own volition about September 18, about the time his school term commenced.

In support of its position defendant cites such cases as Nelson v. Stutz, 341 Ill. 387; Rupp v. Walgreen Co., 270 Ill. App. 346; Reilly v. Connable, 214 N. Y. 586, and Fogel v. 1324 North Clark St. Bldg. Corp., 278 Ill. App. 286. These cases differ materially from the instant one on the facts. We are satisfied that the instant contention cannot be sustained.

Defendant does not contend that Johnson was not guilty of negligence at the time and place in question, but it insists that "plaintiff was guilty of contributory negligence." Plaintiff was fourteen years of age at the time of the accident and lived at Hollis, Oklahoma, where she was a pupil in the grade school. In August, 1933, she, together with Helen Briscoe, her teacher, and Aline Stotts, a schoolmate, also residents of Hollis, came to Chicago to attend the World's Fair. None had ever been in Chicago before that time. They stopped at the Flamingo hotel, on the south side. On Friday, August 11, they went to the Fair and about two o'clock P.M. they left it at the 18th street entrance, intending to go to the hotel. Directly west of the Fair grounds is Columbus Drive, used only for morth-bound traffic. West of Columbus Drive is South Parkway, used for south-bound traffic. At the 18th street entrance to the Fair there was a viaduct, or bridge, over Columbus Drive. At the same entrance

there was a stairway that led to the Columbus Drive street level.

Plaintiff and her party descended the stairway intending to catch a

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rule of law if defendant, under the facts, soul one responsibility for the act of Johnson merely by showing shat it often instructed him not to drive the cars. The facts in the the not to drive the cars, the facts in the the nider of the old adage that ".c.ions speak loader than rords," the wisdom of the old adage that ".c.ions speak loader than rords," Johnson was not discherged after he had injured leintiff, librough Miner know that he was till disregarding the sameded in crustume, and he left the employ of defendent or his own velicion bout spremier

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346; Reilly v. Conneble, Eld M. Y. 586, and 19.01 v. 13 a derth Clark St. Blde. Corp., 278 ill. app. 886. St. of a case editer materially from the instant one on the facts. Corp. that the instant centention dennot be suffice.

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south-bound bus back to their hotel. Upon a prior trip they had entered the Fair at the 18th street entrance and in reaching the entrance they had ascended the same stairway. None of the party knew that Columbus Drive was used only for north-bound traffic. When the party reached the street level they looked for a bus sign, but saw none, and they then sought a policeman, to make inquiries, and they saw one on the west side of the street, "walking back and forth. Miss Briscoe, Miss Stotts and plaintiff all testified that traffic upon Columbus Drive was very light at the time. It was a bright, sunny afternoon. Miss Briscoe testified that when she started westward across Columbus Drive, "there wasn't an automobile or a vehicle of any kind within a block or two of the 18th Street entrance and I started walking straight across west;" that plaintiff was walking across a few feet behind her; that she, the witness, was just across the street when she heard a noise, looked back, and plaintiff was pinned under the ear; that when she reached the west curb plaintiff was right close behind her; that at the time she did not see any other automobile around there, although she looked; that the car in question was the only one "anywheres near;" that men who came up after the accident had to raise the car to get plaintiff out. Aline Stotts testified that she saw Miss Briscoe crossing the street and plaintiff "was right behind her;" that they were walking west and facing west; that as they crossed "there were two or three cars far down the street, a block or two away;" that she "didn't see a car anywhere around near them; " that when she first saw the car in question "it was about a half or two-thirds of a block away. It was probably farther than that;" that when she first saw that car plaintiff and Miss Briscoe were about three-fourths of the way a cross the drive; that no horn was blown; that she saw Miss Briscoe get across and thought plaintiff was across; that she "glanced up and the car had struck her that quick;" that she then saw plaintiff "under the

south-sound bus back to light lotel. The sale site of had ens willion of his one office toout, half end to rial ent benefine entrance they had ascended the same stirmed. one or the party knew that Columbus Drive ass used onl or noth-onen tending. Then the party reached the true havel they have done bus than but saw none, and they then cought a collectual, to rein and ries. and they saw one on the west side of the street, dw lain back and forth." Miss Briscoe, Miss totte and plain is all bestifed that traftic upon Columbus Wive was very light : . (in. time. Je was a bright, sunny efternoon. Ni. Bricego te dirite th' when she eficients and of the states delumbus tive, "there are no are empirically or a vehicle of any kind within a block or the of the 18th their Prithiely told (tree access theirts and the potents) that printiff was walking seross a few feet behind her; that she, the witness, san just across the atreet when abe heard a neice, looks beer, and the old shows onto nath land the cast the bound was Tlitaling curb plaintiaf was right close behind her; that as she tune she did test then other automobile around there, should be looked; beat out in question was the only one "anywheren meat;" that sen the came up after the accident has to raise the car to get plainting out. Aline Stotte testifled that she new Miss Briscoe aroseing the treet and plaintiff "was right behind her;" that they were walking west and facing west; that as they aread "there were two or taree care for down the street, a block or tee away;" that she "diffi" to see a our anywhere around near though that when the tiret one the car in ers il was about a to abritat-oxt to alsa a trode any il noiteeno probably forther than that;" that when and siret and that car plaintiff and time Brisco were about three-fourths on the way across the drive; that no horn was blown; that she saw his Briscoe get across and thought plain it's was notoes; that size "altered up and the ear bed struck hor that outoks" that she saw plaintiff "under the

car right alongside of the west curb." Plaintiff testified that she started across Columbus driveway with Miss Briscoe; that before deing so she looked up the street both ways and saw no car very close; that she could see a block but did not see any automobiles coming in the block south of her; that "there were no cars there at all;" that she did not see the automobile before it struck her. Columbus Drive is a four-lane driveway. Johnson testified that after he left the Powells at the 23d street entrance he tried to turn south at that point to return to the lot, but a police officer told him to continue northward and he did so: that he drove northward in the westerly lane at the rate of ten or fifteen miles an hour; that he intended to turn south again at the stadium and return to the parking lot; that the traffic on Columbus Drive at that time was heavy, traffic ahead of him, behind him, and on the side; that because of it he did not see plaintiff until she was about four feet in front of his car; that at the time he first saw her she was "about six feet from the west curb;" that he did not have time to sound his horn but he "put on the emergency and foot brakes" and stopped the car in about ten feet; that when he got out of his car he found plaintiff between the two wheels; that he has good eyesight, does not wear glasses, and that prior to the accident he did not see plaintiff nor anybody else cross the street although he was looking up the road all the time.

The jury were fully warranted in believing the testimony for plaintiff as to the traffic situation on the street at the time of and just prior to the accident. It is a reasonable inference from the evidence that because Johnson was not permitted to turn the sutomobile southward at the 23rd street entrance and was compelled by the order of the officer to go northward as far as the stadium before he could turn southward, he drove his car at a high rate of speed in his haste to return to the parking lot. Miner testified Mainter

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that the "customers" sometimes gave tips to the boys when the latter drove the cars back. When Miss Stotts, standing on the east curb. first saw the car coming it was about a half or two-thirds of a block away and plaintiff and Miss Briscoe then had only ten feet to walk before they reached the west curb, yet the automobile was upon plaintiff when she had covered only four feet of that distance. According to plaintiff's evidence this four-lane driveway was practically free from traffic at the time, and no person, however careful she might be, could anticipate that she would be run down in the westerly lane, a few feet from the curb, by a north-bound automobile. The conduct of Johnson in striking plaintiff, when he had, according to plaintiff's evidence, abundant space available to pass to the right of her, amounted to gross negligence. Plaintiff and her companions had a right to cross the street at the place in question, and they started across at a time when it seemed perfectly safe to do so. The jury found that plaintiff was not guilty of contributory negligence and we are in accord with that finding.

The sole other contention of defendant is that the court erred in giving what defendant calls plaintiff's given instructions Nos. 1, 2 and 5. The law relating to the giving of instructions, in force at the time of the trial, was as follows (Cahill's Ill. Rev. St. 1933, par. 195, ch. 110):

"The court shall give instructions to the jury only as to the law of the case. They shall be in writing, in the form of a continuous and connected narrative and not a series of separate instructions. To assist the court in fully and accurately instructing the jury as to the law, the parties may at any time submit to him suggestions orally or in writing, and before the case is argued to the jury, the parties shall be given an opportunity out of the presence of the jury to read the instructions which he proposes to give, and then to make other or further suggestions as to matters omitted. * * * * (Italics ours.)

There were no plaintiff's instructions nor defendant's instructions given. Each party suggested to the court principles of law to be given, but the court gave one written instruction. The record

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shows that the court numbered the suggestions "for ready reference to indicate what portions, if any, might be objected to." Defendant objected to that part of the court's single instruction marked 1, "(1) because it failed to include the question of contributory negligence; (2) it failed to state the negligence as charged in the declaration; (3) it failed to state that it must be proved by preponderance of the evidence." The court's single instruction fully and fairly covered all of these principles of law. As to that part of the single instruction given that the court marked 2, it is somewhat difficult to understand the objections that were interposed to it by defendant. However, after a consideration of the part objected to we find nothing substantially wrong in it. That part of the single instruction marked 5 by the court reads as follows:

"5. In determining whether or not Joel Johnson was acting within the course of his employment by the defendant corporation in driving the said motor vehicle at the time of the acts complained of in the declaration in this case, you may also consider his acts and doings in the course of his employment before that time, the instructions given him by the manager of the defendant corporation, Johnson's daily conduct and the acts and doings he actually performed with the knowledge of his employer, and you may also consider in this same connection the duration of his employment."

We think that under the facts of this case the above part of the single instruction was proper.

The trial court seems to have tried the case ably and fairly. The verdict of the jury is a just one and the judgment of the Circuit court of Cook county is affirmed.

AFFIRMED.

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"5. In determing whether o no locations make acting within the course of his employment by the differdent corporation in driving the eals motor vileal; the dime of the acts occapation of in the declaration in this saws, you may also consider his acts and colour is a last out so his employment before that time, the intermediant dvalue by the manager of the defend at apper thon, John on's ally service and the meta and doings he actually performed with the knowledge of his employer, on'y year, year, and the surjeys of his employer.

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Sullivan, r. J., and riend, J., concur.

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MARY C. BRANDL, Appellant,

V.

VILLAGE OF WINNETKA, a Municipal Corporation, Appellee. APPEAL FROM SUPERIOR COURT

OF COOK COUNTY.

287 I.A. 6221

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Mary C. Brandl filed her complaint against the Village of Winnetka, a municipal corporation, in which she prayed that an injunction issue restraining the Village from enforcing a certain zoning ordinance as amended against her property located in the Village. The Village filed a "motion for judgment" and also a "motion to dismiss," both of which motions were overruled. Defendant then pleaded to the merits, but in its answer renewed the objections which were the basis of the two motions that had been overruled. When the cause was called for trial the trial court, at defendant's request, allowed it to again argue the said objections and then ruled that plaintiff was not barred by certain former mandamus proceedings but that she had an adequate remedy at law and was therefore not entitled to equitable relief. After the complaint had been amended an order was entered that the former order overruling the motion for judgment and the motion to dismiss be vacated and that the said motions stand to the amended complaint as amended. The trial court then entered a decree overruling the motion to dismiss based upon the mandamus proceedings, but further ordering "that the motion of the defendant for

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VILLAGE O' SIMPERS, B Manicipal Corporation,

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Mary C. Brindl and a telephone delicity of the Charles figure of the day hers. hi , no is requor for inthum a , and cant. To en i to an armi english this thing to another thing certain soning ordinance as amended excite the community legated in the Village. The Village filed a "meeten in the forgist" also a "motion to dismis, a soth of chich action" a calculation Defendant then pleaded to the morits, but in its our or other the objections which were the basts of the torrection. The times been overruled. the the cause was ealied or the the ortal court, at defendent'e request, allowed it to a in army ine colobjections and than ruled that also and tooks of former mandenue proceedings but the late is an element maker at law ame was there or not entitled to but the lief. the cemileist has been an about a state of a state of the last of the state of the mission of the range approached dission be vacated and that the sair me .ion. Stend of the in-The trial cours of complaint as ausmiduc. ings, but further ordering "that the messen a tar alone c.

judgment on the ground that the facts stated in the amended complaint this day filed herein are insufficient to give this court equitable jurisdiction since it appears from the facts stated in such complaint that there is an adequate remedy at law for the alleged injuries set forth in the complaint as this day amended is hereby allowed and the plaintiff declining to plead further and electing to stand on her complaint as this day amended, the complaint as this day amended is accordingly hereby dismissed." Plaintiff then appealed to the Supreme court, whereupon defendant filed a motion in that court for an order transferring the cause to this court, and in support of the motion cited the final order of the trial court and contended that "the order appealed from is limited solely to the dismissal of the complaint in chancery on the ground that the facts stated in the complaint showed that the plaintiff has an adequate remedy at law," and that the trial court in passing upon the motion of defendant for judgment predicated his ruling solely upon the ground that plaintiff had an adequate remedy at law. The Supreme court thereupon found that the case was wrongfully appealed to that court and ordered it transferred to the Appellate court of the First District.

In this court defendant contends that "this appeal presents to the court solely a question of pleading - whether or not there is an adequate remedy at law for the injury alleged in the amended complaint. If this court considers the validity of the ordinance independently of these pleadings, it will be doing so as a matter of original jurisdiction;" that the trial court did not consider the question of the validity of the ordinance and that therefore this court is without jurisdiction to consider that question; that "the remedy by mandamus is a complete and adequate remedy at law for the injuries complained of by the plaintiff and therefore injuries complained of by the plaintiff; "that "the remedy junctive relief should be denied to the plaintiff; that "the remedy

dudament on the around the table stated in the made o coloint this day filed herein are insufficient to sive this score a will ale this form a sign of the day to all and more examples to eath moisoibelunt to melining senally out not yet is more a taugobs us at onedt tedt soir are complaint on this may emembed in hereby release are soir plaintilf declining to plead further and election to stand in her complaint as this day smended, the complaint are this juy amended in accordingly hereby dismissed." Plaintiff then and led to the upraise court, whereupon defendant filled a motion in that court ter on order transferring the cause to this court, and in support of the motion cited the final order of the trial jourt and contour. Thet "the order apposise from in limited solely to the clamissel of the campleint in chancery on the ground that the facts stated in the continint the te that the plointiff has an adequate remedy it law," and the trial beduciberg thought not insent the metion of the most to more than the his ruling solely upon the ground that plaintiff has an adopaste romang at law. The dupreme court thereupon dound the die on the fully appealed to that court and ordered it transferred to the Appollat

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of mandamus would give to the plaintiff what she requires."

The complaint alleges, in detail, that the amended ordinance as amended in so far as it applies to the immediate surroundings in question, singles out plaintiff's property as one to be regulated by a different law them other properties in the immediate vicinity, but in view of defendant's position in this court it is not necessary for us to state in detail all of these allegations. From the complaint it appears that plaintiff owns certain property located on the corner of Scott and Linden avenues in the Village of Winnetka: that on August 30, 1934, she entered into an agreement with the Sinclair Refining Company, a corporation, whereby she agreed to sell and the Sinclair Refining Company agreed to buy part of her property, viz., the westerly 100 feet thereof, for \$20,000, the sale to be completed as soon as she should obtain an occupancy permit under the zoning ordinance or should otherwise secure the right to erect an automobile filling station thereon; that the Village refused to issue a building permit for the construction of a gasoline filling station or to issue its occupancy permit allowing the use of plaintiff's real estate for such purpose, on the sole ground that section 5 of the zoning ordinance of the Village forbids such use of the premises by reason of its location within 200 feet of buildings used or constructed for use for residence purposes; that the original soning ordinance was adopted by the Village on January 17, 1922, and created five districts, which included all of the property in the Village; that on January 17, 1928, the Village adopted an amendment to the ordinance whereby automobile filling stations were allowed only in the "D" Industrial District; that on December 16, 1930, the Village adopted a further amendment to the ordinance whereby automobile filling stations were allowed in the "C" Commercial District, subject, however, to a proviso as follows:

"Provided, however, that no person, firm or corporation shall locate, build, construct or maintain an automobile filling

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of mandamus would give to the plaintin that the requires."

The complaint alleges, in detail, that the emen'ed o'dinance as amended, in so far as it applies to the isameolate surroundings in question, singles out plaintif's property as one so be regulated by a different las than other properties in the insect the violaity, but in view of defendant's position in this could it is not a secsety for us to state in octail all of sheld o'ligations. For any o'm haint it appears that plaintiff owns o'ligations. For any o'm has some of soct and linden avenues in the Village of innethed in the some and suggest 30, 1936, she entered into an e-reservat lith the include failule Company, a corporation, shoreb, she appeared to sell and the Singleir Mefining Company sereed to buy part of her property, vis., the westerly 100 feet thorouf, for \$20,000, the sale to be sompleted as soon as she should other in a columnny period unear the Loning or should otherwise a sure the right to deep an areanosite or should otherwise a sure the right to deep an areanosite or should otherwise a sure the right to deep an areanosite or should otherwise a sure the right to deep an areanosite.

filling station thereon; that the Village refused to in u. a sullding permit for the construction of a juschine filling that itsine of company permit allowing the use of plaintiff's real estate for such purpose, on the sole ground that esciton for the order ordinance of the Village forbids such use of the president is the Village forbids such use of the president in the village forbids such use of the president is the village forbids such use of the president is the village forbids such use of the president is the village forbids and use of the president is the village forbids and use of the president is the village forbids and use of the president is the village forbids and use of the president is the village forbids and use of the president is the village forbids and use of the president is the village forbids and use of the president is the village forbids and use of the president is the village forbids and use of the president is the village forbids and use of the president is the village forbids and use of the president is the village forbids and use of the president is the village forbids and use of the president is the village forbids and use of the president is the village forbids and use of the president is the village forbids and use of the president is the village forbids and use of the village forbid

tion within 200 feet of buildings used or con amake for use for residence purposes; that the original summa or issues was a costed by the Village on January 17, 12, and created five situates, which included all of the property in the Village, the tendency my 17, 15; , the Village adopted an exendance to the or inance where is automobile

filling stations were allowed only in the "L" Industrial District; that on December 16, 1930, the Village adopted a further emenant to the ordinance whereby automobile filling atations were allowed in the mon Commercial District, subject, however, to a province as solowor.

"Provided, however, that no person, firm or corporation phali locate, build, construct or mulntain an successful liling

station, within two hundred feet of any building used as and for a hospital, church, library, community or parish house or public or private school or kindergarten and provided further that in measuring said minimum distance of two hundred feet such portion of said distance as lies within the boundaries of any public street shall be counted twice."

The complaint further alleges that on Movember 7, 1933, the Village adopted a further amendment to the ordinance which prohibits the location, building, construction or maintenance of automobile filling stations within 200 feet of any building used or constructed for use in whole or in part for residence purposes; that this amendment affects plaintiff's property. The complaint further alleges that if plaintiff's property can be used for an automobile filling station is is the most valuable piece of property in the Village for that purpose; that it is not at this time salable or usable for any of the other commercial purposes permitted in the "C" Commercial District nor will it become salable or usable for such purposes for a long time; that if her property cannot be used for the purposes of an automobile filling station it does not have any market value for any purpose and cannot be sold. The complaint further alleges that the restriction contained in section 5 of the zoning ordinance "has caused plaintiff great and irreparable injury by depriving her of the immediate sale of her property, constitutes a continuing cloud upon plaintiff's title to the premises owned by her and so long as such restriction remains in force she will be unable to sell or dispose of her property/will suffer irreparable injury unless the enforcement of said Section 5 of the Zoning Ordinance is restrained by this court." The complaint prays, inter alia:

"(b) That the Village of Winnetka, a Municipal Corporation, its officers, agents, and employees may be perpetually restrained from enforcing said ordinance in so far as it prohibits the location, building, construction or maintenance of an automobile filling station upon the property above described by reason of its location within two hundred feet of any building used or constructed in whole or in part for residence purposes or from threatening to enforce such terms of said ordinance against such property.

stetion, audia two bunfrs feet os a silvio asses as ar an a hospital, church, library, community or partice home or pulic or private school or kindergarten and provided further that in measuring said minimum distance of two hundres feet such portion of said distance as lies within the boundaries of any public street shall be counted twice.

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The complaint further all ges that an accordan ", 1985, the villinge adopted a further amendment to the ordinace. High mould for the location, mulding, construction of mint bonce of the 11 inc stations within 200 feet of any willian madd or contracted for use in whole or in part for readdened purposes; the claim amendment first toponic a filter this figure off. . The property atosits if plaimiff's property can be used for an anthropilla : lim, station i is the most valuable piece of property in the Villege for their option pase; that it is not as this time salable or us ble for a time definition for the the the second purposes in the tell with the second religion of the second religion in the second religion to the seco nor will it become a lable or usable for and pure of the same time; that if her presently common be used for the gurp of con The Tollow of the and the cook and the cook of the control of the purpose and cannot be sold. The compliant of the ladger in to the bo : 11 5 30A" of the weather o finale restriction contained in a colon plaintiff great and irrept ble injury by a revin. he of the immediate sale of her property, constitutes a status almo upon plain.iff's title to the premises some by box on's slow or each cogals to II. : 6. . I. . co of the woll borot at animar acitetricor of her pro-cety/will enforce in gar the tajo granter the thing mant of said Section 5 of the eming will mee is we trained by the courts." The complaint prays, inter alias

^{&#}x27;(b) That the Village of aimeths, a hardiged Corpor tind its officers, agents, and employees mry or prof. to train of from enforcing said ordinance in to far said prohibits the lossion, building, construction or asintenance of an atmobile iditian utality chore described by a construction within the property chove described by a construction of its lossion within the bundred test of any building used of construction at ordinance or in part for residence purposes or from threatening to anionee

- "(c) That the Village of Winnetka, a municipal corporation, its officers, agents, and employees may be perpetually restrained from interfering with the location, building, construction or maintenance of an automobile filling station upon the property above described by the plaintiff or by anyone claiming by, through or under her by reason of said property being located within 200 feet of any building used or constructed in whole or in part for residence purposes or from threatening any such interference.
- "(d) That the plaintiff may have such other and further relief as the premises may require.

"That a writ of injunction may issue to restrain the Village of Winnetka, a Municipal Corporation, its officers, agents and employees from in any way interfering with the location, building, construction or maintenance of an automobile filling station upon the property mentioned in this complaint as amended by reason of the location of said property within two hundred feet of any building used or constructed in whole or in part for residence purposes."

Plaintiff contends that "1. The Court erred in sustaining the motion for judgment. 2. The Court erred in holding there was an adequate remedy at law. 3. The Court erred in holding that it was without equitable jurisdiction. 4. The Court erred in dismissing the complaint for want of equity."

that the Village be ordered to give her a building permit. She wants no permit. She wishes to sell a part of her property to a purchaser who will pay \$20,000 for it if it can be used for filling station purposes and she asks the court to restrain the enforcement of the zoning ordinance as applied to her property, so that she may be enabled to sell the same. She alleges that her property is practically valueless at the present time for any other purpose; that the ordinance operates to destroy the value of her land and its marketability, and that the zoning ordinance is arbitrary, unreasonable and confiscatory as applied to her property. That such a complaint is maintainable in equity see Reschke v. Village of Winnetka, 363 Ill. 478, wherein it was held (p. 486):

"In determining whether the invasion of property rights under a purported police power, is unreasonable and confiscatory,

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The trial court and counced to the William have in the deived the purpose of the are laint. Laint of no wir therein that the Village be ordered to give her a wilking mait. he wenter The wishes to sell a furt of his part to the parties of sensity off. who will pay 120,000 dor it it is not 000,000 yay film one

purposes and the cake this count to be in the and that if goning ordining to applied to met proposty, as we all tage ba to sell the mame. In this gut that he gao, the Legent 11 lle volueless at the pre-int time to the purpose; the the line Linese the entilled destroy at the entile is to see we and to estable the testerage that the somin oreduance is abbitrary, which countries no confide to outsimilated to the art fine of the adult of the hiller man in a collection of the vertical to small vertical on which one with the

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"In determinion, hather the laws for o. reproduct the under a purported police power, is unressonable and continestory,

the extent to which property values are diminished by the provisions of a zoning ordinance must be given consideration. (State Bank and Trust Co. v. Village of Wilmette, supra [358 III. 311]; Forbes v. Hubbard, supra [348 III. 166].) The reasonableness of the ordinance is necessarily determined by the facts in the particular case. Tews v. Woolhiser, supra [352 III. 212]."

See also Ehrlich v. Village of Wilmette, 361 Ill. 213, wherein the court stated (p. 222):

"A court of equity will direct its restraining power against the enforcement of an ordinance, if ground exists therefor, to prevent irreparable injury. A zoning ordinance may be valid in its general aspects, and yet as to a particular state of facts involving a particular owner affected thereby be so clearly arbitrary and unreasonable as to confiscate his property and justify the interposition of a court of equity to restrain the enforcement of the ordinance. Village of Euclid v. Ambler Realty Co., 272 U. S. 365; St. Andrew Society v. Kansas City, 58 Fed. (2d) (U. S. Cir. Ct. of App. 593,) 599; Nectow v. City of Cambridge, 277 U. S. 183; Kennedy v. City of Evanston, 348 Ill. 426; Phipps v. City of Chicago, 339 id. 315; Western Theological Seminary v. City of Evanston, 325 id. 511."

We have not stated all of the allegations of the complaint for the reason that defendant, by its position, concedes that the complaint made out a <u>prima facie</u> case for equitable relief if it does not appear from the complaint that mandamus would give plaintiff all that she requires, and it is apparent from the complaint that mandamus would not afford plaintiff the relief she seeks.

The decree of the Superior court of Cook county is reversed and the cause is remanded with directions to the trial court to over-rule defendant's motion for judgment on the ground that the fæts stated were insufficient to give the court equitable jurisdiction, and for further proceedings not inconsistent with this opinion.

DECREE REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

Sullivan, P. J., and Friend, J., concur-

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OLGA SHOUKANOFF

Appellant.

WILLIAM C. WALDBAUER et Appellees.

APPRAL. FROM SUPERIOR COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff Shoukanoff is the owner of a principal note lettered "U" on which there is, as she claims, a balance unpaid of \$300. and another of the same series of notes lettered "LL" for \$100, and one lettered "SSS" for \$500. These were part of a series of 97 notes issued by John A. Westland and Ellen Westland on April 10, 1928, in the aggregate amount of \$35,000, to secure the payment of which the makers on the same day conveyed certain premises in Cook county, Illinois, to the Chicago Title and Trust Company as trustee. After the execution of the trust deed and about October 27, 1928, the Westlands conveyed the premises to Dimiter G. Ducoff and Kallopia Ducoff, subject, however, to the lien of the trust deed.

July 19, 1932, default having been made in the payment of these notes, plaintiff, in behalf of herself and all who were holders of these notes so secured, filed a bill to foreclose. The bill was duly verified, made the Westlands and the Ducoifs, the trustee, and unknown owners of the notes, parties defendant. The bill alleged that the premises, which are located at 5700 North Maplewood avenue, Chicago, and improved by an eight flat, two story building, were scant security for the debt; that the makers of the notes were insolvent, and prayed for the appointment of a receiver to collect the rents pending the suit and for foreclosure.

On the motion of solicitors for the complainant, the court on July 29, 1932, appointed Theodore C. Nemoyer receiver.

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July 19, 1932, defeat usylm and after the ter panert erse notes, plaintiff, in burst of a rest and the was series holders of these notes so secured, iff it hill to foracipac. The bill was duly verified, . do co o do line on the ducing. the trustee, and unexawn o here of the trustee, and unexample The bill alle, of that the ormises, waid are located to bar horth Maplewood avenue, whiche, and in present by an eight 12. t. two story builling, were some seem, y for the debt; Int the makers of the notes were insolvent, and are set for the action of rot by the out will no store out toolice of reviseer a to closurs.

on the motion of socilitors in the commitment, the court on July 29, 1932, appointed theolors of leroyer receiver. receiver, however, failed to qualify by giving bond as required, and Ducoff, in the meantime, collected the rentals from the property.

August 8, 1933, William C. Waldbauer et al., owners of similar notes, secured an order from the court giving them leave to intervene, and August 15, 1933, filed their answer to the bill, in which, while admitting the execution of the notes and trust deed, etc., they denied that plaintiff was the owner of the notes, denied that there was a balance due thereon as alleged, and denied that the same were a valid lien against the premises under the terms of the trust deed. On the contrary they averred that Ducoff, ewner of the equity, in fact owned these notes, and that the notes were paid and delivered up to the owners after the maturity of same, and that plaintiff was merely the nominal holder of them; they prayed that the bill of complaint might be dismissed.

September 11, 1933, defendants Waldbauer et al., filed a to cross bill alleging the same facts as/the alleged ownership of the notes by plaintiff. They asserted that plaintiff purchased the notes from Andreas Schultheis before the filing of her bill, and that the bill to foreclose was not filed in good faith but in collusion and fraud with the Ducoff's for the purpose of controlling the foreclosure proceedings, and to prevent the true owners of the notes from protecting their interests, and to compel them to accept an inequitable plan of reorganization of the property.

They averred that they were the owners of more than 50% of the entire issue of the notes, set up the material facts as to the execution of the notes and trust deed, the ownership thereof, the conveyance of the premises, and defaults of those obligated to pay, and prayed that the trust deed might be foreclosed.

Plaintiff answered the cross bill, denying its allegations as to non-ownership, payment, etc., of the notes held by her, and

receiver, however, failer to runifively in the land is recoired, and Ducoff, in the manufile, collinged the restant from the oreyerty.

September 11, 1882, dof 2 of 2 and 2 of 2.1186 of cross bill alies of the court of the cross bill alies of the court of the cross by plaintiff. The, court of the limit of the notes from Andreas conditions and the bill to forestore when the bill to forestore when the court of the forestosure and from and from the forestore, and the forestosure and continue the forestore whose of the court of the forestore the court of the court of

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Plaintiff answered the cross bill, ... mging its al-enstions as to non-ownership, payment, etc., of the no co-weld by der, and

denied the alleged collusion with the owners of the equity. cause was put at issue and referred to a master, who filed his report finding in favor of cross complainants, recommending a decree of foreclosure in their favor and that the original bill be dismissed. The cause was heard by the chancellor upon exceptions of plaintiff to the report of the master. These exceptions were overruled and a decree entered in favor of the cross complainants on July 25, 1935. It finds a total of \$36.958.70 to be due to thirtyfive different owners of the notes and directs the sale of the premises. To reverse that decree the plaintiff has perfected this appeal. The decree finds that Dimiter Ducoff and complainant were guilty of collusion; directed that the indebtedness represented by the notes held by plaintiff should be cancelled as a lien against the property and enjoined the plaintiff or any persons acquiring the notes thereafter from bringing proceedings to establish any such lien thereunder. The decree further provided that the order "shall in no way preclude Olga Shoukanoff or any other persons from enforcing the collection against the makers." The decree ordered that the bill of complaint be dismissed for want of equity, and that Ducoff (who is now dead) should account for the sum of \$1808.12, which was the amount of the rentals from the premises collected by him as a result of the failure of the receiver to qualify.

Plaintiff contends that the court erred in sustaining the findings of fact set forth by the master, and also erred in entering a decree as recommended by him cancelling the lien of the three notes held by the plaintiff, while at the same time providing that the notes themselves should not be cancelled, but that the owners might proceed against the makers thereof. Complainant contends that regardless of how the notes were acquired, she was entitled to maintain a representative suit to foreclose on behalf of all the note holders, and that it was improper for the court to permit a cross

en ... i. . ee 'o er avo er: 'ir oor blace begelfr eds heineb and it bound or it was not burn for our last is jug as reques port finding in favor of original significate, rac a seeing of foreclosure in their favor or that the might be in the missed. The cause was misr' or the thunce list door exceptions of plaintiff to the report of the oter. These sous alma ere everno sou at atmos store sur a royal at bearing perces a has before July 25, 1935. It finds a to de Solat of Solaton of the converge five different everes of the notes and lireaus on the ar w dar me deere . The deere . its a military a military and . League guilty of collusion; directed and and are retresected by the property and enjoined the called in the real securious the notes thereafter from brin, ing proceedings or retorition by the lien thereunder. The 'ceres furnier provi et a the order "and in no way proclude (lgs societies) of the state again obligate way ing the collection against the memore. " The learer where the tre bill of complaint be the issen for want of emit, on that has if (who is now dead) should necessary to a set ofw. was the amount of the reliable the end are all to the amount of as a result of the failure or the receiver to ,. lift,.

Plaintiff contemies that the out thereoffers a fing the findings of fact set forthere is the same, and the decree as recommented by an ender-in the situation of the notes held by the plaintiff, where it the order the proceed against the makers thereoffers thereoffers the notes here of how the notes were therefore, and the series of how the notes were nearly and the result of the order to the court to the notes here therefore or engly of the order hotes had the interest to include the notes had the court to the court to the notes had the following the same that it was improper for the court to the same to the court to the

bill to be filed and to allow solicitors' fees and expenses to cross complainants. These fees and expenses, it is alleged, should have been allowed to the plaintiff.

We have examined the evidence and find that it supports the findings of the master and of the decree and justifies the conclusion of the chanceller that the suit by complainant to foreclose (ostensibly brought in the interest of and for the benefit of all the holders of the notes) was in fact brought in collusion with and for the benefit of the owners of the equity. This conclusion is compelled by uncontradicted evidence, which shows the close friendship between the Shoukanoffs and the Ducoffs; the promise of the husband of complainant, John K. Shoukanoff, to help out the Ducoffs; his purchase of the notes in the name of his wife when the same were past due and without investigation of the worth of the security; his personal employment of a lawyer to act in her behalf in the foreclosure proceedings; the fact that the attorney thereafter acted in the interest of the Ducoffs as against the owners of the notes, in that he secured an order appointing a receiver, who did not qualify, and who has not since been found, thus deceiving the owners of the notes and permitting the Ducoffs to retain control of the mortgaged premises from August 1, 1933, to October 1, 1933, during which time they collected rents to the amount of \$1803.12, which, if the matter had been properly pressed, would have been collected for the benefit of the owners of the notes. The plan of reorganization of the property prepared by this attorney was decidedly favorable to the owners of the equity. All this with the absence of material exhibits from the record makes it quite impossible for us to hold that the findings of the decree are in this respect contrary to the weight of the evidence. On the contrary, we hold the evidence justifies the finding of the decree that the suit was collusive. A court of equity will not

should have been allowed to the larnin. We have causin o the ever see our time that it supports the findings of the marter and of the decree and justifies the conclusion of the chancellor sust in this by emplainent to foreolose (osteneibly brought in the interest of an for the benefit notrullee at the yeld Jeal all design and To arebled edd ils to with and for the benefit of the owners of the e wity. This conclusion is compelled by uncontrovicted evidence, which shows the close friendship between the hoursanding and the Macoffs the promise of the husband of emplainant, John . . Shoukenoff, to help out the Lacoffe; his jurchese of the notes in the name of his wife when the same were past due and ithout have the line of the worth and mi tor or try, I have two myologram Lamora og aid tytingers out to bohalf in the for closure processings; it is it is the atterney thereafter acted in the interest of the class seals and the owners of the notes, in the income of the new protections as receiver, who did not or hify, one no or adde been found, thus decriving the a near a contract of the analysis and to retain control of the mostanged or wise. . on agust 1, 1923, to October 1, 193., sur m. thish time they collected rents to the smount of (1803.12, thich, the means to term project, resteed, would have been collected ser by the from the owners of the notes. The plan of routginin tion of the property prepared by this attorney was analderly involved to the orders of the entity. All this with the observe of weighted existing and the record makes it quite inges thie for no to be it the indings of the decree are in this regret smarry to the this in one ostook On the contrary, we half the redence justificathe thating of the

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permit such abuse of its process. He who comes into equity must come with clean hands. He who is guilty of iniquity with respect to the very matter concerning which he prays relief will not be allowed to prevail. In Pomesoy's Equity Jurisprudence, 3rd ed., vol. 1, sec. 397, page 657, comparing the maxim that "He who comes into equity must come with clean hands" with the other maxim that "He who seeks equity must do equity" says:

"On the other hand, the maxim now under consideration, 'He who comes into equity must come with clean hands,' is much more efficient and restrictive in its operation. It assumes that the suitor asking the aid of a court of equity has himself been guilty of conduct in violation of the fundamental conceptions of equity jurisprudence, and therefore refuses him all recognition and relief with reference to the subject-matter or transaction in question. It says that whenever a party who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy."

The decree therefore, insofar as it dismissed the complainant's bill, was proper and will be affirmed.

But a different principle, we think, controls as to the relief granted to the complainants on their cross bill. These complainants were asking equitable relief and to them the maxim that "he who seeks equity must do equity" was applicable. The decree we think went too far in adjudging the cancellation of the complainant's lien under the trust deed as the owner of the three notes in question, and enjoining her further resort to the courts to seek her rights thereunder, except by way of a suit at law against the makers of the notes. The uncontradicted evidence showed complainant was the owner of the three notes described in her bill; that the same were due and unpaid; and that they were secured by the trust deed upon which the cross-bill was presented. She is equitably entitled to receive her share of the proceeds of the sale under the foreclosure decres.

It was error to remit her to a suit at law against the

permit such abuse of its incomes. To who could note to outly out one come with olean hands. To who is guilby if initially the record to the very matter concer indivate the prays relief will not be allowed to provail. In follow plant with the outliest the concerning the make that "he was 39", page 68%, comparing the making that "he was the order with the other make come with the state of the other make the contribution of the other makes and the contributions."

"On the other hard, the anxim now unter consideration, 'he was cone into equity must come with clear deads,' is a source effect and restrictive in its operation. It assess and the aid of a court of equity was himself area, district of conduction of the fundamental encertain of equity into a control the result of an encourter of equity in a control of the subject-marker of all recognized and resist in that whenever a party who, as sett, seems an estimate in a says machinery in motion and obtains come recedy, and victures an expectate or good faith, or office equitable principle, in a significant then the doors of the court ill or and the court will refuse to interfere an ais set and one court will refuse to interfere an ais set and one court will refuse to interfere an ais set and one court will refuse to interfere an ais set and one court will refuse to interfere an ais set and one court will refuse to interfere an ais set and one court of the court of

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makers, who, the evidence shows, are no longer owners of the premises and whom it may be most unjust to compel to make payment of these notes. The master should therefore have found that complainant, as cross defendant, was the owner of the three notes; further, the amount due to her thereon with interest; that she was entitled to have the same satisfied protanto out of the proceeds of the sale. He should have included the amount due to her with that of other owners of the notes. For this error the decree will be reversed and the cause remended to the trial court with directions that the chancellor cause such computation of the amount due to cross defendants on these notes be made, and the amount so found be included in the decree with directions that the owner be allowed to participate equitably in the proceeds of the sale.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED WITH DIRECTIONS.

O'Connor and McSurely, JJ., concur.

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ADVANCE HEATING COMPANY, a Corporation.

Appellant,

VS.

CATHOLIC BISHOP OF CHICAGO, Appellee.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

287 I.A. 6223

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

entered into a contract with complainant, a contractor, whereby it was agreed that plaintiff should furnish material and labor to install a heating plant on defendant's premises at 4846 West Montana street, Chicago. Specifications prepared by defendant's architect, James Burns & Company, were made a part of the contract. In January, 1931, plaintiff began work under the agreement, and completed the work and furnished materials as called for by the contract, plus extras amounting to \$845. The original contract called for the payment of \$3550. Assuming that the work has been properly completed in compliance with the terms of the contract, there is a balance unpaid to the amount of \$495.

Plaintiff brought suit for this claimed balance in the Municipal court of Chicago, which was afterward, while this present suit was pending in the Circuit court, dismissed by stipulation of the parties. The present bill was filed May 4, 1933, to establish a lien against the premises for the alleged balance with interest from May 4, 1931. Defendant answered setting up certain defenses. The cause was referred to a master, who took the testimony and filed his report, recommending that the bill be dismissed for want of equity. The cause was heard on exceptions to the report, which were overruled, and on May 5, 1936, a decree was entered dismissing the bill.

The controversy between the parties concerns a "Morrissey"

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ADV.ACS HEATILD COLPANY. Corporation.

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December 19, 1830, to offer that to come and and entered into a contract with enables we, a contractor, a life of the in the first control of the sale of tes it is the sail or is the and the no thank a few alless it Tourismit and the control of the con In January, 19 1, plaintiff begut era under the a reconst. contract, plus extras evouste no se in the plus extract called for the payment of 1888t. In this to the roll believe been properly completed in compliance in the complete of the company tract, there is a band of upsile of all sire of the

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oil burner, called for by the specifications and installed by the manufacturers under a subcontract with complainant. May 8, 1931, an explosion occurred on the premises, which caused clouds of smoke laden soot to penetrate the entire building, ruining the furnishings, paintings, etc., and causing damages to an amount of \$575, for which defendant seeks to recoup in this litigation, on the theory that the burner furnished was defective and complainant negligent in the operation of it.

One of the defenses interposed by defendant is that plaintiff's claim was released by an accord and satisfaction. already stated, at the time of the filing of the bill in this case a suit, brought by plaintiff against defendant based upon the same claim, was pending in the Municipal court of Chicago, May 9, 1933. this suit at law was dismissed by stipulation of the attorneys for the respective parties. The stipulation did not mention the suit pending in the Circuit court, which had been filed, but service of summons had not been obtained, although there is evidence tending to show that defendant's attorney was aware that the suit was pending at the time the stipulation was entered into. Evidence was offered in behalf of defendant tending to show that the attorney for defendant understood that the claims of both parties were to be dropped; but there was no proof of any valid agreement to that effect, nor proof of authority given to its attorney by complainant to make any such settlement. The master found against the contention, the chanceller approved, and we cannot say that the finding of the master in this respect is against the evidence.

The complainant, on March 9, 1931, executed a waiver of lien, and defendant argues that complainant is thereby estopped from now claiming a lien. Such, undoubtedly, would be the effect of the waiver as to work done and material furnished prior to the date upon which the lien was executed and delivered. The master,

oil burner, chiled for a subcontract with Josephin wit, why is 1931, manufacturers under a subcontract with Josephin wit, why is 1931, an explosion occurred on the norminace, which courses alone of same laten about to nemetrate the empire with in , rain , rain with furnishinge, saintings, etc., and vasima dance as a subcut of \$575, for which defend with severe to recomp to untailier, then on the theory what the carmer is missed and drivetive it so, so, plainant negligant is the operation of it.

One of the defences interposed by the white is west plaintiff a claim was released by an look in early totion. already stated, at the time of the filter of the oil in this case a suit, brought by plaintiff a sine of the page and the same eyent sis sai to addishould by becal elb may was is tice aldi for the resucctive partises. Lie activistion if not service the suit, penting in the Circuis court, which is the instinct, out survice of summons had not been obtained, though there is evidence tive one I so this saw year not, a trabhestoh tant worm of gribnot sometave . com for the school cold that the guibned and was offered in behelf of defend a ten ing to record ai bereito ass mey for defendant understood or a termination to bootstobnu thebusted tot year te be dropped; but there was no proposed ville greedent to Unat offect, nor proof of authority with to its attorney by could to make any such settlement. . It has to the the contention, the chancellor approved, such we can be say to the in ing of the master in this respect is applied by ever the

The compishment, on March 9, 1981, executed a curver of lien, and defendant argues that compilands it thereby to the constrom new claiming a lien. Duck, undoubtedly, on the so the effect of the waiver as to work fone and material farriesed order to the date upon which the lien was executed and delivered. The master,

however, finds and the proof tends to show that after that rime complainant furnished equipment and labor to the total amount of \$471.65. Complainant is therefore not precluded by the waiver.

the Circuit court, and no sworn statement as to subcontractor's material, men, etc., as provided for in sections 5 and 7 of the Lien Act. (See Illinois State Bar Stats., 1935, chapter 82, sections 5 and 7, and the same sections in chapter 82 of Smith-Hurd's Illinois Statutes.) Defendant argues that complainant's suit can not be maintained for failure to comply with these sections of the statute, and cites Gilmore v. Courtney, 158 Ill. 432; Weiska v. Imroth, 43 Ill. App. 357; Hart v. Carsley Mfg. Co., 221 Ill. 444; Knickerbocker v. Halsey Bros. Co., 262 Ill. 241. The Gillmore case and the Weiska case were both decided under the Lien Statute of 1887, and were based upon a provision in that statute which does not appear in the present statute. Hall v. Harris, 242 Ill. App. 315. The other cases cited are not in point. Complainantais not precluded from maintaining its suit for these reasons.

Defendant also contends that plaintiff cannot maintain the suit because there was no final certificate from the architect, and cites <u>Michaelis vs. Wolf</u>, 136 Ill. 68. This point was not raised in the trial court. The defense was not set up in defendant's pleading and it cannot avail here, when presented in this court for the first time.

This appeal, therefore, seems to turn upon the issue of fact, as to whether the finding of the master, as approved by the chancellor, that defendant was liable for the damages resulting from the explosion which occurred May 8, 1931, should be permitted to stand. There is no doubt, as complainent points out, citing many cases, that the burden was upon the defendant to establish his

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claim of recoupment by a preponderance of the evidence, nor is there any doubt, as complainant points out, that the report of a master (where, as here, no evidence was taken before the chancellor) is only advisory; to the chancellor, and while <u>prima facie</u> correct is not entitled in this court to the same weight as the verdict of a jury or the finding of a chancellor where the evidence has been taken in open court. It is so held in <u>Mallinger vs.</u>

Shapire, 329 Ill. 629, and <u>Stasch v. Stasch</u>, 355 Ill. 581.

The contract between the complainant and defendant provided that defendant agreed -

"To furnish and install a complete Low-Pressure steam heating apparatus in a convent building to be erected for St. Gertrude's Parish, located 4846 W. Mentana St., Chicago, Illinois, according to the plans, specifications and drawings (which are declared to be a part of this agreement), made by James Burns & Co., Architect (acting as agent for said owner), in a good and substantial and workmanlike manner, to the satisfaction of and under the direction of the Superintendent."

The specifications thus made a part of the contract provide that:

"Contractor must guarantee the perfect operation of this plant in every detail; that it will be noiseless in operation. Contractor shall also guarantee that he will make good any defects in work-manship, material or effectiveness of plant within one year after completion of same without cost to owner."

Specification as to the oil burner was that the contractor should "furnish and install one 'Morrisey' #6 Fuel Oil Burner, mercoid thermostat, making job completely automatic in operation, burner to be of sufficient size to operate #8295 Pacific oil burning boiler, full-rated capacity *** boiler to be set by others, as oil burner contractor may specify."

The installation of the heating system was begun in January, 1931, and the master finds that it was finished on May 9, 1931. The contract for putting in the oil burner was sublet by plaintiff to the Morrisey Oil Burner Company, which installed it. Frank Lessnau, an employee of the Morrisey Company, made the installation. Mr.

claim of recompant by a presenderance of the entry one is continued to there any doubt, as compliant prints out, the entry corters and manter (where, as term, no evication of a term of the print of the entry is and advisory to the entry of the fit this epurities of a second in the fit of the court is the second as the verdict of a jury or the fit and, of the entry of the fit and, of the entry of the fit and the entry of the entr

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vide that:

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McLean was superintendent of the job for the contractor, and the Burns Company, architect, representing the defendant awner, were in charge for him. The burner was put in sometime in February. Immediately thereafter defendant made complaints about the operation of the system, and to Lessnau seems to have been committed the duty of making any necessary adjustments in conformity with the contract.

The master finds that the nozzle of the oil burner was removed and a larger nozzle installed in order to supply more oil for fuel when all the radiators had been connected; that after the installation of the larger nozzle there was an accumulation of carbon and soot in the oil burner which interfered with the proper mixture of air with the oil, thereby preventing the complete combustion of burning of the oil supplied by the larger nezzle as fuel; that as a result the explosion occurred on May 8, 1931, blowing greasy soot through the building, injuring the paint, curtains and the inside of the building. The master further finds that on the day of the explosion the representatives of the complainant and Lessnau, the employee of the Morrisey Oil Burner company, examined the building and the extent of the damage; that Lessnau removed the nozzle supplying the oil for the burner, stating, "Here is where the trouble is: " that he replaced the nozzle, since which time no trouble has occurred in operating the heating plant.

The conclusion of the master was that the damage to defendant's building was "occasioned by the defective operation of said oil burner," for which the complainant is liable.

The plain terms of the contract with the facts as recited would seem to justify the conclusion of the master. Plaintiff nevertheless contends that it cannot be held liable for the reason that the "Morrisey" Oil Burner was purchased by defendant under a trade-name, and plaintiff relies upon section 15, paragraph 4, of

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Burns Company, architect, represent, the definition of the protection of the burner was put to any object in the source.

Immediately thereafter definition the sum a mit. To present the tion of the system, and to here in a sent some of the constited the duty of making any recessary adjusts that is a constract in the contract.

was rom. The said to perform and dand afait redress off removed and a larger nozele installed it whit to sail a core oil for fuel when all the redistors and beau commuted; and fuer the installation of the larger corres of the installation of carbon and soct in one oil burner . Los carbon and soct its one nitropy mixture of air with the cil, thereny have time he sommete combustion of burning of the dil aug lies of a larger torale as f-al; that as a result the as Lotion occurred or and firem a sa tant gressy soot tirough the whiching the hours of the ansature the inside of the bolding. The strain of the critics with on the Learney, the suployed of the deries yould be rear company, easthed the building and the latent of the second resemblind of nozzle supilging the oil for the trans, to the manifeque elzzon the trouble is: " that he real end the narmals, since with the ide trouble has courred in coer time one sad eldwort

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The plain teres of the contract of the mester. Plaintist nevertheless contends that it cases be continued that the "Morrisey" will burner as purchased by friends to that the "Morrisey" will burner as purchased by friends to trade-name, and plaintist relies door section 15, paragraph 4, of

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the Uniform Sales Act (Illinois State Bar Stats., 1935, page 2807; Smith-Hurd Illinois Stats., chap. 121, section 15), which provides:
"In case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose."

complainant cites a large number of cases in the Supreme and Appellate courts of this state, such as Fuch v. Kittredge & Co., 242 Ill. 88; Santa Rosa---Vallejo Tan. Co. v. Kronauer & Co., 228 Ill. App. 236, and Neigenfind v. Singer, 227 Ill. App. 493, construing that paragraph of this section of the statute. We hold that neither the statute nor any of the cases cited are applicable where, as here, the contract between the parties provides not only for the sale of the article but its installation in a manner satisfactory to the purchaser, and promises to make good any defects within one year after completion, without cost to the owner. Not the statute but the contract is here controlling.

The findings of the master seem to have been based upon the testimony of the assistant pastor of the church and the architect.

Walter J. Burns, as to conversations with Frank Lessnau, the employee of the Morrisey Oil Burner Company, on the day on which the explosion occurred. The complainant objected to the evidence at the time it was offered and contends here that it was error to admit it for the reason that the conversation took place out of the presence of any representative of the complainant, the Advance Heating Company. Defendant cites in support of this contention eight cases, all of which we have examined. These cases, under the various circumstances appearing in each of them, hold that a party is not bound by statements of a third party, who is not his agent, unless the party sought to be bound or some person authorized to represent him is present. Defendant's counterclaim here does not rest merely upon oral statements made by Lessnau but rather upon the contents of the contents and the counterclaim here does not rest merely upon oral statements made by Lessnau but rather upon the contents and the contents and the counterclaim here does not rest merely upon oral statements made by Lessnau but rather upon the contents and the contents

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testimony showing what Lessnau, an employee of the subcontractor actually did in the course of his duties under the terms of the contract between complainant and defendant. It is not contended that the testimony as to what Lessnau did was incompetent, and we are quite at a loss to understand why testimony as to the acts being competent, evidence as to what he said while acting was incompetent. The subcontractor was certainly the agent of the contractor in the installation of the oil burner. His employee. with the consent and acquiescence of all the parties in charge of the improvement being made, acted for the plaintiff in carrying out the terms of the contract. It would seem on the plainest principles that what he said and did within the scope of his duties was admissible in evidence. While the amount here involved is comparatively small, the record and briefs are voluminous, and every possible contention seems to be presented by the parties. We have given these contentions careful consideration, but the issue seems to narrow down to a question of fact as to whether the complainant carried out the terms of the contract as agreed, and if not, whether it is liable for the damage resulting from defects in the heating plant which was installed. We think complainant is/liable. The master has so found; the chancellor has approved the finding; and an examination of the evidence leads this court to the same conclusion. The decree of the trial court is therefore affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

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O'Connor and Resurely, JJ., concur.

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PETER A. MEYER,
Appellant,

VB.

SAMUEL A. COHN, Appellee. APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

287 I.A. 6224

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

failure to buy certain real estate as agreed. The declaration set up the alleged contract verbatim, which was in writing, alleged ability and willingness on the part of plaintiff and refusal to perform by defendant. The common counts were added.

Defendant filed the general issue with certain special pleas.

The cause was submitted to a jury. At the close of all the evidence the defendant moved for an instructed verdict in his favor.

The court, in conformity with section 68 of the Civil Practice

Act, reserved its ruling and submitted the cause to the jury,

which returned a verdict for plaintiff in the sum of \$23,000.

Defendant first moved for a new trial, then withdrew that motion in order to move for a judgment in his favor notwithstanding the verdict. The court allowed the motion and entered judgment against plaintiff and in favor of defendant, and plaintiff appeals.

The alleged contract was executed May 11, 1926. The real estate in question was Nos. 4900-02-04-06 West Chicago avenue, was in fact the northwest corner of West Chicago avenue and Lamon street. The premises were improved by one-story buildings designed for business use, were owned by Meyer and in part occupied by Tony Lembardo, who carried on a fruit business. Meyer became the owner of this property on March 19, 1926. A man named Gorad ran a drug store just across the street from the premises. A new theater

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building was about to be erected on Chicago avenue in this immediate neighborhood, which some supposed would add to the value of real estate in that vicinity. An old building stood on the site of the proposed theater. A permit for wrecking this building was issued May 12, 1926. A contract for the rerection of the new building was executed July 14, 1926. Work was started July 30th thereafter and continued until October 21st, when it was temporarily stopped to be begun again June 30, 1927, and completed in August of that year.

Meyer, the plaintiff owner, lived in Elmhurst. not prior to this transaction known the defendant, who lived at 750 Kennesaw terrace, Chicago, and was an investor in stocks, He seems/to have been at the officeof bonds and mortgages. Charles Sincere and Company in Chicago. Defendant for about fifteen years had been acquainted with H. L. Siegel, who conducted an automobile business at 3806 Roosevelt road. Chicago. Siegel says, and defendant does not deny, that sometime in April. 1926, he and Siegel met at West Baden, when defendant asked him about the new theater to be erected and asked him if he knew of some property out of which he could make some money. Siegel owned a piece of ground just 125 feet west of these premises owned by Meyer. In fact Siegel at one time rented part of the premises from Meyer for use in the automobile business. Siegel also knew William J. Klibanow, who had for many years been in the real estate business and who, at this time, had a partner named Stein. Klibanow was a licensed broker and operated two real estate offices in Chicago, Klibanow says Siegel introduced him to Cohn at West Baden, but Cohn says he does not recall the introduction. Klibanow says that at West Baden he talked with defendant about property in Chicago and told him that he would

building was at ut to the erich so the second of the contract of the neighborhood, which so the post would also to the value of real vicinity. The contract of the contract that extending the contract of the

. Meyer, the obstriction of the areast. not prior to wile transaction where we at a committee; to 750 Mannesew terrace, duicago, and a a dryamber in the Ma. bonds and mortgages. .e see. grant bas shoot Charles Sincers and To sany in unicase. er wast for about tiv estalances used had steen asoftl'h -000 00.7 . 1.8Lu . ducted to authorized business it sport is authorized blackworth in betout Siegel Bays, and defendant do and the and and April, 1926, we are blagged mot of section at data are the we are a result and an experience of methods were out funds will of some property out of which canal mer so a space . owned a place of grand dast let were not been relief owned by Meyer. It fact liegol at the the first il part of premises from Leyer for use in automobile build s. also knew William J. Alibanow, The and For . By yours post in tendre . Don , seis eins sa , on we an apprised estate last eff real estate offices in Uniongo, Maline or any a chill into weed him to Cohn at Vert Saden, har dem says to bee to testificae introduction. Alibanow says tand t west exert in to take wit, defendant about property in Chicago and told aid that he reald be glad to submit some properties for his consideration. Klibanow by appointment met defendant at the office of Charles Sincere and Company. Mr. Siegel came with him and Klibanow says defendant was driven to the property and went through it for the purpose of examination. Siegel says that when he came back to Chicago Klibanow brought defendant to his store, and that defendant then said he was buying this property and would like to have Siegel go with him to look at it; that he, Klibanow and defendant then drove to it by automobile and from there to plaintiff's house at Elmhurst about 4 o'clock p. m. of the day the contract was made. It appears that on their way to the property these parties visited a tavern where they had beer; that upon arrival at Elmhurst they were taken to plaintiff's cellar where they sampled some four or five casks of wine, and that afterward plaintiff's daughter served further liquid refreshments. It is agreed that they talked about the price; that defendant offered \$80,000 for the property. Plaintiff wanted more. Plaintiff's brokers, however, took him aside and persuaded him, as he says, to accept \$83,000.

Defendant says that Klibanow, Siegel and Stein came over to the office of Charles Sincere and Company, where defendant was on May 11th, in the forencen; that he told them that if they would wait until two o'clock he would go with them to look at the building. They came that afternoon in an automobile and drave first to the Independent Realty Company office. Klibanow told defendant that the premises were occupied in part by Lombarde, who did not have a lease but was paying \$400 a month rent; that Mr. Gorad had agreed to take a 25 foot corner and pay a rental therefor of \$250 a month; for a term of five years; that Lombardo was willing to take a 20 foot store at the west end of the building and to pay \$1500 a year for five years; that he figured that when remodeled at a cost of \$5200 the building would bring a gross revenue of \$9000

Wilbarow by amoistment net date that the line of care Sincore and Corpany, Ar. Sies 3 cours : i. ad thib down asys defendant was driven to the property and wont throng. i. i.e. the purpose of enomination, when the term is that to be -and to broad the definition of the tell to be and the compact of eart then send he was buying elong story of the mont tas Siegel go with this to look at it; and and a side of with this ag legel them drove to it by automobile and from an an intill angues at Elmhurst about 4 o'clock n. M. of the che e of tract na ands. It appears that or their way to the proper of we purtice visited a tavern where they had been; that I on arrive at a manuet they To the plant till's callar of ore of this deleg of maket exem former and wine a control of the transfer and to exerce out further Hquid refreshments. It is wire to . . , this migut the price; that defendent officed off, . for the drop rig. -lantiff wanted more, stabiliti's braking, a syst, too air adde and persuaded him, as se says, to recent . . .

Defendent says that will brow, where we are over to the office of Charles Singers and Do now, where desendant was on may lith, in the forencon; thus a constant would wait until two o'stock or washing. I was a constant they came has aftermount in the constant the independent dealty so pany of its to the independent dealty so pany of its ort in the constant that the creates were occapied in cart in the foreign did not have a lease but was paping advant and the constant the was paping advant and the constant of the same a fere of five years; that cold not have a lease but was paping advance and may record a correct to take a 20 foot corner and may record a correct to take a 20 foot atom at the west end of the publishing would bring a gross revenue of apond at a cost of \$5200 the building would bring a gross revenue of apond

a year. He says they drove to the building but did not go in, and that from the building they were driven to Meyer's home in Elmhurst as heretofore recited. When the price was finally settled, defendant asked about the tax bills and was told they were in a safety deposit vault. He asked about special assessments and was told there were none. He asked about the leases from Lombardo and Gorad told and was given the same assurance and/that he should not worry.

Klibanow asked him for a check for \$5000 to close the deal, and defendant told him he would see about it the following day. Klibanow than called him aside and told him in a confidential way that there were many people interested in the property and he had better make the deal "right here." Defendant told him he did not have anyone to represent him, and that he wouldn't give him \$5000.

Klibanow replied.

"I will tell you what you do. Give me a check for \$1,000. We will use that as a binder, and tomorrow morning you bring me the additional \$4,000. I will have here the tax bills; I will have the receipts; I will show you the leaseholds; I will show you everything to that."

Defendant says he agreed; that Klibanow took the contract from his pocket, sat down at the desk, filled in the paper, and that that plaintiff then signed it and tendered it to defendant, who also signed. He then asked Klibanow if he had a blank check. Klibanow said he did not. Plaintiff then tendered him one of his checks, so he wrote out a check for \$1000 and handed both the paper and the check to Klibanow. Defendant says that the contract was not in the same condition then as it was when offered in evidence; that he understood he was merely signing what he calls a "binder." He says he was to receive a written contract the next day, when he was to bring in an additional \$4000. Klibanow then drove defendant home.

The following morning, with Mr. Durell and Mr. Barney Lewin, defendant visited the building which he was to purchase, saw Lembardo

Klibanow replied.

a year. de mye they trov to the carring black to the adthat from the billding they wer driven to key I'l ou a limiterer as heretofore recited, Then the price was it and the action 至3. I same the difference of the media and sunda hands the He named about which seem of the standard and deposit vault. barne is o'is danod mort wassel o' jucos besieve. there were none. and was given the same assurance in four a moult not worry. Klibanow asked his for a cacek fo should a mone the bell, tend the call selection of the state of the state of the call works rosend I was line grader of the his foregressia also a visus orow erends envene to represent aim, and that a would be alied by

"I wilt tell you wont you do. ..ive so so lost to ... 'e will use that as a binder, and tobornow worming you rid show the tional Mayors. I will dove now ... too biles; I vill adow you too it. ... this show we energy to that."

Defendant may the syreed; t. i. incover near trown is pooled, gat down et dest. filled i did a per, ...d that that plaintiff then ..., need it with the first in to be recont, who also signed. He has saxed .linear with the clear and the first of the saxed .linear with the checks, so he wrote out a check ... or limit is the same check to milture. The checks, so he wrote out a check ... or limit ages at the contract out a check ... or limit ages at the contract to milture. The check to milture. The check to milture ... or was not in the same condition ... and ... we were offered in this dence; that he understood he was more is the contract the understood he was more a stricter contract the day, when he was to heim, in an additional ... interest the day, when he was to heim, in an additional interest the drove defendent come.

The following corning, thus r. dured and r. daring with, defendent visited the building with he as so suredise, saw tombardo

and Gorad, each of whom told him that the representations made by plaintiff's agents to him concerning their leases were untrue.

Defendant then called up the bank and stopped payment on the check he had given them. Then he called plaintiff and asked him to come and see him, and plaintiff came a few days later. Defendant testifies that Meyer said to him at that time,

"'Why did you stop payment on that check?' I said to him, 'That is the reason I asked you to come over here, Mr. Meyer.' I said to him, 'Mr. Meyer, I can't understand the reason why you have tried to put through a crooked deal of that kind.' He says to me, 'What do you mean?' I said, 'Exactly what I mean. The deal is crooked, and you know that the deal is crooked. You were present right there when Mr. Klibanow told me that Mr. Gorad had agreed to take space in that store and pay a rental of \$250 a month and you said nothing, and you were present when Klibanow told me that Mr. Lombardo had agreed to take twenty feet of space in that store and pay a rental of \$125 a month and you said nothing. You heard all these things that Mr. Klibanow told me.' 'Well,' he said, 'I didn't tell you that, did I?' I says, 'No, but your agent told me that.' He said, 'I am not responsible for what real estate agents tell you.' I got so hot under the collar that I felt I could not control myself add I just walked out of that room."

matter after the 12th day of May, and denies the testimony of plaintiff that several days thereafter defendant told plaintiff he hadn't decided whether he wanted the property, and that he hadn't called the deal off yet, or words to that effect. Defendant denied that he ever saw Klibanow, Siegel and Meyer together at his office after May 12th, or had the conversation to which they testified. He admitted, however, he could not recall whether he had testified on another trial that Klibanow came to see him a number of days after he stopped payment on the check, and Henner, a witness called by defendant, says that he saw plaintiff at Sincere's office a number of times after that date, and also the court reporter who took the evidence in a former trial of another case based on the check testified that defendant was asked how many times in all he had seen Klibanow and replied that Klibanow came

and Gorad, each of whom told he content to a server at the by plaintiffs agents to him content to the cutton server at the content then called no tanger. I as storied a server at the called and given them. Then he called a server a server and plaintiff came a server as a server a server and plaintiff came a server as a server. It is a that keyer said to do at the time time.

Defendant de fed that he sou e to the bodh the matter often the late had the late the late the late the late the late the fed to the condition of plainting that several days thereader diff that several days thereader diff that several decided whether he santed and originally, and state hadn't called the fead off yet, or words to the cifect. The hadn't called the fed offer the sever evaluation, inject and sever at the office after they late, or and reconstruction to it. May testified, the admitted, however, he could not recall the call the several had testified an another this, that illustrow case to see it a mamber of days after he stoped payment on the carea, or nother, a witness called by defendant, says that or saw office a number of these office a number of these who took the syldence in a for er trial of allower.

times in all he had ween althonow and replied that allie or came

over a number of times after he stopped payment on the check.

Plaintiff and Klibanow in rebuttal gave evidence denying defendant's testimony as to statements made concerning the leases to Lombardo and Gorad.

Defendant contends that his motion for judgment notwithstanding the verdict was justified because there was no evidence tending to show that plaintiff was ready and willing to perform his part of the agreement to convey, because he did not offer an abstract of title, a guaranty policy, a Torrens certificate, or a warranty deed as required by the contract, all of which it is said were conditions precedent to sustaining this action. large number of cases which are not applicable because the uncontradicted evidence shows (assuming a valid contract) that defendant first breached it by stopping payment on his check, thus repudiating and disavowing the contract. Where one party to a contract has thus breached and repudiated (as defendant's own testimony here shows he did), the other party is not obligated to perform his obligations under the contract before bringing his suit for damages. As is stated in Lang v. Hedenburg, 277 Ill. 368, "It' a contract calls for successive acts, first by one party and then by the other, there is no breach by one if the precedent act has not been performed by the other. " When defendant stopped payment on the check he unequivocally repudiated the contract.

Defendant also contends that the judgment notwithstanding the verdict was proper because plaintiff failed to prove his title to the premises in question. There was proof tending to show possession under claim of title. There was no proof to the contrary. Defendant did not base his refusal to carry out the contract upon any supposed deficiency or defect in plaintiff's title. He made no objection to the title and cannot be heard to urge that objection now. Ashbaugh v. Murphy, 90 Ill. 182; Smith v. Keeler, 151 Ill.

over a number of times alter be stooded Daymer of a care.

Flaintiff and alibanow in reparts) gave evidence in ing defendant's restinouy as to statements and constraint to combardo and dorad.

Defendant contends that are come interpreted notwing atuating the verdict was justified bussine there was no estimple aid archreg of willile your beer sew Williake Jear were of Anibast part of the exrement to convey, breside it not all on an abstract of tille, a guaranty policy, a formes cert linete, or a the side as required by the contract, all of the resident were conditions precedent to saste in this action. He cites a large number of cases which are not an introduction by sale of tradicted evidence shows (aseasing a valid contract, tot infordant first breached it by stopping payment on his oneas, thus resudisting and disavowing the contract. Where one nort to contract as ero. you list two eff. the def sed best bed bas best bed and sin artist of the carty are party and amount of the state and obligations under the contract poloce but ing its sait has land es. As is stated in Large v. Medenburg, 277 III. 364, "In a converet calls for successive some, first by one carry as then by breother, there is no breach by one if the procedure is as als not been performed by the other. " When lefer or it is nu more in the check he unequivocally repudicted to ording a.

Defendant also contends that the judent contends the verdict was proper because planniff four distance it little to the premises in question. There was proper to show possession under claim of tule, there as an armit to the anterest of the carry out the ontract upon bereadant did not base his refused to carry out the ontract upon any supposed deficiency or defect in plaintiff out the line and cannot be near the unge that objection no objection to the time and cannot be neard to unge that objection now, Ashbaugh v. Murphy, 90 111, 102; swith v. seeler, 151 111.

518; Spengler v. Eiger, 255 Ill. App. 322. Moreover, when plaintiff offered to prove his title by a warranty deed duly acknowledged and recorded, conveying the premises to him, defendant objected and the court (erroneously) sustained the objection. Defendant is now estopped to assert any lack of proof in that respect. Bigelow on Estoppel. 5th ed., page 720; Modern Woodmen of America v. Anderson, 71 Ill. App. 351; Thompson v. McKay, 41 Cal. 221.

A more serious question is raised by defendant's contention that plaintiff failed to prove by competent evidence that he sustained substantial damages by reason of defendant's alleged breach of contract. Plaintiff undertook to prove his damages by the testimeny of Klibanew. The full record of the testimony of Klibanew material to this point is as follows:

"Mr. Kahn (attorney for plaintiff): Mr. Klibanow, based upon your experience and knowledge of real estate transactions in that vicinity, that immediate vicinity, and your knowledge of the conditions that existed, have you an opinion as to the value of the property known as 4900-02-04-06 West Chicago avenue in the latter part of June, 1936?

Mr. Tannebaum (attorney for defendant): I object to the question, it is too indefinite, the witness is not competent.

The Court: You mean the fair cash market value?

Mr. Kahn: Yes; I meant the fair cash market value of a front foot or any way you know how to figure it, particularly on the property in 1926.

The Court: Objection overruled. Ar. Kahn: Have you an opinion?

Yes, sir. A.

Honor.

What is your sopinion? Q.

Mr. Tannebaum: I object to that. The Court: Objection overruled.

A. I was offered, the best offer--Mr. Kahn: Not what you were offered.

The property has depreciated. A.

Mr. Kahn: That may go out. You are not answering my . The question is, what your opinion was of the value of question. this particular property, 4900-06 West Chicago avenue in the latter part of June, 1926.

A. \$50,000. Mr. Tannebaum: I move the answer be stricken out, your

The Court: Objection overruled. "

This is the only evidence in the record tending to show the amount of plaintiff's damages.

Defendant contends that it is in several respects insuffi-

318; doengler v. ingr, 255 als. And sel out us at the first that the second for the sec and recorded, conveying the level of the straight of the and the court (erron-unual) for a december of el mant le on Establel, with old, reserved to the property of A more corious de. . . in the y duffer tenden that plen till fauler to prove by constant vice of the mass tained subject that the case T was a defend a line of the case ontwact. It is the same of a control of the control of

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The Court: .bjectio. cverrain.

CHYR YOU IN OPLIANCE : 12 (2) . 7. Mes, sir. $_{\Psi}d\lambda$

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I mave the mewer of stric on out, your Tannelsaun: . TM Honor.

The court: Objection overrand.

This is the only evidence in the r cori ocharage to say the amount .as wash a Tritaisig to

Defindant contends that it is in several respective insurance

cient. Firstin that the question asked called for the past rather than the present opinion of the expert witness as to the value of the property. Second, that it was indefinite in that it called only for the value of the property without limitation as to the fair cash market value thereof. As to the first objection, defendant cites Lyons v. Chicago City Ry. Co., 258 Ill. 75. It seems to sustain his contention. As to the second, Dickson v. Turner, 149 Ill. App. 394, and Dady v. Condit. 209 Ill. 488, which also seem to be in point. We think, also the evidence was incompetent for the reason that it purported to fix the value of the land at an indefinite time in June instead of fixing it as of the 12th day of May. 1926, at which time the breach of the contract (assuming such breach as the jury found) actually occurred. The cases last cited hold that the true measure of damages in an action for failure to convey real estate as agreed is the difference between the fair cash market value of the land and the contract price on the day upon which the contract was breached. There is no testimony in this record which can fairly be said to establish the fair cash market value of these premises on the 12th day of May, 1926, when the defendant repudiated the contract, stopping payment on his check and charging that the contract had been obtained from him by false representations.

We may add that while on the issue of fraudulent representations there was unadoubtedly a question of fact for the jury, an examination of the evidence has convinced us (notwithstanding some inaccuracies in defendant's evidence) that these representations were made; that defendant relied upon them, and that the verdict of the jury upon this issue was against the manifest weight of the evidence. It is unreasonable to suppose that defendant would have executed the contract under the circumstances here shown unless, induced by representations such as he relates and high pressure salesmanship which the evidence shows was applied. It is hardly

genera Jak to to the Los Conta design and Jak to the teriff . the io than the present of thion of the expert visions and a continue the property. Mash', tim' is not in erillite in the income enty for the wrige of the or, ire, without limit close as the fair cash market value thereof, a s and a strong the fine, se dast cites hyons v. whisange with the west 251 att. F. F. 88 . .. tain mis contervious as To the as and when the T. App. 394, and dady v. vonill, A. C. C. A. Com Let a company in bolds. We that, who because it was every because it reason test it norgores to like the test of test in an in enter nite time in June trates of firth is a common or the common of 1925, at this time the branch of a confided and entire them present as the jury found) action of the termine . . . to draw the country was that the true resure of the grant . . . then for direct our seems THE WAR ARE THE RESTORDED TO THE PROPERTY OF THE SAME AND THE TRANSPORTED TO THE PROPERTY OF T value of the ten emptract of the suley and the bule contract was breathed. There is no usal tog the till record thing ed of to enim the fairly be edited that the state of the second that the previses on the 18th day or ear, 1986, a mere or the eact religion the contract, attending points as all seeds as a tractal function contract had been obtained are an about the restance

We may add that we will also as the isoto in the standard of the analysis of the contract of the truth of the truth of the truth of the truth of the analysis of the truth of the allowers of the truth of the truth of the allowers allegated the truth of the analysis of the truth of the truth of the allowers allegated the truth of the analysis of the truth of the truth of the allowers allegated the truth of the truth of the analysis of the analysis of the truth of the analysis of the truth of the analysis of the analysis of the truth of the analysis of the analysis of the truth of the analysis of the analysis

credible that the cash value of these premises fell 25 per cent in a few days, as plaintiff's evidence tends to show.

The judgment is affirmed.

AFFIRMED.

O'Conner and McSurely, JJ., concur.

credible that the case value of these premises frie 25 her cent in a few days, as plaintiff's svidence tends to accw.

The judgment is affirmed.

AFPE GESU.

O'Connor and McSurely, Ji., concur.

39108

RICHARD L. WHITTON,
Appellee,

VB.

OUTDOOR ADVERTISING AGENCY OF AMERICA, Inc., Appellant. APPEAL FROM MUNICIPAL COURT

287 I.A. 623¹

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action on contract for commissions claimed to be due, and upon trial by jury there was a verdict in favor of plaintiff for the whole amount claimed, namely, \$2353.53, upon which the court, overruling motions of the defendant for a new trial, and for judgment, notwithstanding the verdict entered judgment which defendant asks us to reverse, contending first that the judgment should be reversed without remanding, but in any case reversed and remanded because it is manifestly against the evidence, because the court erred in its rulings upon the admission and exclusion of evidence and in giving and refusing instructions.

Defendant corporation is an advertising agency engaged in procuring outdoor advertising accounts from national advertisers and carrying the same into execution through artists, lithographers and others for "plant owners," that is persons who own and operate poster display and paint display structures and locations upon which may be appropriately erected and maintained electric advertising displays. Defendant maintains an office in Chicago, New York and other large cities in the United States. L. P. Scoville, Jr., is president, Porter F. Leach, Vice president, in charge of the Chicago office; John Lutzen, service manager and assistant secretary; R. T. M. McCready, general counsel and organizer, and one of its directors; E. W. Stevens, sales manager of the Chicago branch of the business; Raymond B. Lawrence, secretary and treasurer.

39108

RICHARD L. WHITTOK.

Appeller,

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OUTDOOR ABVERTISIES, M. L. CY OF AMERICA, Inc.,

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PR. PREALDING JOURIC MATCHETT DELIVERED THE CHILLS OF THE CONTROL OF THE CONTROL

In an action on contract for conductions of the due, and upon trial by fury there was a versict in fiver of plantiff for the whole amount claimed, narely, \$2550.35, upon this the court, overruling motions of the defendent of new trial, and for judgment, notwitherenting, and verfant of religion, the set of the defendent asks us to reverse, consendent of the reversed and remarked because it is mainly solved in reversed and remarked because it is mainly solved in the rulings upon the action evidence, because the court erred in its rulings upon the action stone and exclusion of evidence and in iting a refraction.

Defendant corporation is an any string accounts of maniform alversions procuring outdoor adversion accounts of maniform and carrying the same into execution which which is possed of there for "plant owners," that is possed of the outlook and paint tingley stringures of the outlook and paint tingley stringures of the outlook against tingley stringures of the outlook against the form which may be appropriately erect form which will be appropriately erect form which will be appropriately and there is the same of the feedent, before in whe with the field of the field of the field with the same and the service of the contract of the directors; where the service we are set of the original of the business; Raymond it was such as the original of the business; Raymond it was such and treasurer.

In the spring of 1932 plaintiff, through Mr. Leach of the Chicago office, entered into an oral agreement with defendant by the terms of which it was agreed that he should accept employment by defendant, according to the version of plaintiff, as a "salesman or solicitor." but according to defendant as an "account executive." The business of defendant was conducted upon such a basis that it was supposed to receive in full compensation for its services as intermediary between the advertisers and the "plant owners" 16-2/3% of the total charge for such advertising. The salesman. solicitor or "account executive." whose principal duty it was in the first instance to secure the account of the advertiser, received a commission of 71% of the total amount received by the defendant from the customer in full compensation for his services. Defendant in March, 1932, employed plaintiff upon that basis to perform such services. As already stated, the agreement was oral and it would appear did not cover all possible contingencies. It is agreed that plaintiff was to pay his own travelling and hotel expenses; that the contract was not for any fixed period and was not to be determined at any particular agreed time. Compensation was to be computed enfirely upon the basis of such customers as should be secured for defendant by plaintiff. Plaintiff entered upon his employment and continued in that relationship to defendant up to about March 25, 1935. On that date he wrote John Lutzen that he would send in no more orders under the former arrangement; that he had consummated a new arrangement for handling his business, and that future commitments would go through this channel. The letter explains that the reasons for changing his relationship were wholly financial; he asks Mr. Lutzen to thank the officials of the company for their uniform courtesy and requests that if new business should come into the office in connection with painted displays for Detroit or Houston that Lutzen would see that it got into the hands

In the spring of 1932 plaintiff, through ar, Leach of the Chicago office, entered i.t. an oral surcement with defend at by the terms of which it was agreed than he should accept employs ent by defendant, according to the versi m and this, as a select m or solicitor, " but according to def . was he an "account executive, " The business of defendant was conjucted doon such a basic last was supposed to receive in full componition for its services as "ansuvo fuele" a. a topitravba out mowet d vesiberrotal 16-2/34 of the total coarre for mech a war ising, the saleson, solicitor or "account executive," where principal duty it was in the first instance to secure the account of the advertisor, reclined a commission of the total shound received by the defendant from the customer in full compensation for his services. Defindant in March, 1932, employed plaintiff upon that basis to verfor each services. As already stated, the agreement was oral not it would appear did not cover all possible continuencies. It is a reve that plaintiff was to pay his own travelling, said notes expenser; that se contract was not for any fixed points on as somethic oil termined at any particular agreed then. Co penential was to be computed entirely upon the basis of suce customers as should be secured for defen ant by plaintiff. Il intiff entered upon his e ployment and continued in that rel tiorenin to definiant a to shout March 25, 1935. On that lete he wrote to m hutren mat le mo ind send in no more orders under the forer arrangement; that hold de consummated a new arrangement for a willing air aires, on the same future commitments would go through this chantel. I'me letter out plains that the reasons for charging his relationship were wholly financial; he aske ar. butsen to thank the officials of the co pany bluoma sequient won ti tar ! ale uger bus ysetues mrolinu ried rol come into the office in connection with related displays for Deshand odd ofal for it tent see blow martal tent notesok to fiort

of Mr. Thomas Scrutchin of 624 S. Michigan avenue, Chicago. The evidence shows that a few days prior to this time plaintiff entered into a copartnership with Scrutchin by which they agreed to carry on an advertising business as copartners.

The controversy between plaintiff and defendant concerns accounts which he obtained for defendant prior to that time. Plaintiff procured for defendant two orders for poster advertising from the Paige Motor Company, one for \$11.941.10 and another for \$14.682.72. Plaintiff also obtained from the Brown-Williamson Tobacco Company an May 21, 1934, an order for an advertisement through an electric spectacular display to be made in the city of New York. The advertisement was to continue for a period of three years beginning August 1, 1934. For the first twenty months the Tobacco company was to pay \$2400 a month and for the remaining months of the contract \$1725 a month. The Motor company during April and May paid to defendant on account of these contracts obtained by plaintiff \$26.623.80. Plaintiff claims a commission on account thereof amounting to \$1996.79. From April to September. 1935, the Tobacco company paid to defendant on account of the contract obtained for defendant by plaintiff \$14,400, on which plaintiff claims a commission of \$1080. The total claimed by plaintiff under these two accounts is \$3076.79. The parties are agreed that defendant at plaintiff's request made an advancement to him of \$723.26, which should be credited upon any sum found due to plaintiff. This leaves a balance of \$2353.53, the amount of the verdict upon which judgment was entered.

Defendant contends that plaintiff forfeited any payments which might have accrued on these accounts because he resigned his employment and entered into competition with defendant. It contends that plaintiff was obligated to give an entire as distinguished from a partial service with respect to these accounts, and that payment

of Mr. Thomas Scrutchin of 324 i. Michigan Avenue, onicheo. Alse eyidence shows that a few also prior to this the also this? C t-rediate a separtnership with derutchin by raits they agraed to carry on an advertising business as concrutates.

The controversy between all this is the meeting and entering accounts which he obtained for selection or or to the vine vine. gricitrevbe rateon to around our Justication not becaused Thitaisia from the Paige Motor Company, one for \$1.341.30 and ended of \$14.662.72. Plaintil also obtains from the drown-williamson Tobacco Company on May 21, 1934, as e der our su stversieesert through an electric spectacular display to see the true city of Mew York. The advertisement was to continue for a neriod of taree years beginning August 1, 1934, Lor to a fact tenty and a the Tobacco company was to pay \$2400 a near that for the manning months of the contract \$1725 a month. The Apter Journey within April and May paid to defandant on account of these contracts oftained by plaintiff \$25,625.80. Plaintiff claus - co mission on secount thereof amounting to wisst. 79. . ros world to destember. 1935, the Tobacco company paid to of start on secure of the contract obtained for defendant by printiff flagt, a rick pluin. titif desime a counission of plow. The country by plantiff under three two accounts is \$3070. The parties or acreed ust to mi, or the constitut a plant traper at litthial to thebretes \$723.26, which anould be or dited upon way aun wound dee o pr 1. tili. This leaves a balance of \$255.55, to sount of the verifit

Defendant contends that plaintiff frieted by payments which might have accrued on those accounts because he resimed his employment and entered into competition with defendant. It someties that plaintiff was oblighted to give an entire or distinguished from a partial service with respect to these accounts, and that payment

upon which judgment was ortered.

of his commission was conditional upon the rendering by him of such complete service. The officials of the company and certain expert witnesses engaged in the advertising business gave testimony to the effect that in the usual course of business such entire performance would be proper, usual and customary.

Plaintiff meets this contention in two ways: First, he testified that there was nothing in the oral agreement which required such continued service on his part, as a condition precedent to payment of his commissions, but, second, he gave testimony tending to show that as a matter of fact he was and has been at all times able, ready and willing to give such continued service as to these two accounts. He says that he told Mr. Lutzen when quitting that he was at their service insofar as any accounts he had created for them were concerned.

Defendant has argued that under the evidence, as a matter of law, the judgment should be reversed without remanding because. as it says, the judgment is manifestly against the weight of the evidence, and because the proofs show that plaintiff was an agent of defendant who abandoned the continuing duties of his agency with defendant and entered into competition with it before the completion of his duties, and, moreover, because, it says, that the state of the proof is such that a new trial will not result in the production of different evidence, hence an absolute reversal without remanding is proper. Defendant cites Kiess v. Block & Kuhl Co., 205 Ill. App. 167, to this point, and calls our attention to the provisions of the Civil Practice act. (See Smith's Illinois Stats. 1935, chapter 110, sections 68 (b) of subsection 3 and paragraph (f) of section 92, pages 2434 and 2447.) The opinion in the Kiess case is only abstracted, and the abstract does not. as we understand, correctly state the law on this point. Neither do the sections of the Civil Practice act authorize, as

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of his commission was con interesting by a constant such complete service. The complete service, the complete service, the contract of the company of the service of the contract witnesses engaged in the advertisent trainess save testimmany to the effect that in the usual course of business such or tire performance sould be groper, usual out castomry.

Plaintiff meets this convention in two ways: first, he testified that there was nothing in the oral agreement which required such continued service on his cart, he was nothition precedent to payment of his conmissions, but, second, we kee testimony tending to show that as a marter of fact he was no has been at all times able, ready and willing to give such continued service as to these two accounts. He says must are also remarks as to these two accounts. He says must are also remained that he was at their service inspirer as any accounts he had created for them were concerned.

Defendant has argued that under the avida ce, as a marror of law, the judgment should be reversed without remanding becase. as it says, the judgment is manifestly agamet the reight of the evidence, and because the proofs and thet plaintiff was an agent of defendant who abundaned the continuing outless of mis wiency fit. -algebra and eror of it has not situated of an baratue has tashneleb tion of his duties, and, moreover, because, i see a that the state of the proof is each that a new trial will no result in use production of different evidence, hence in absolute reversal without remanding is proper. Defendant cites piece v. block a suit Co., 205 111. App. 107, so this notet, as calls our estentian to the provisions of the civil Pr ctace act. (dee amit's lillings Stats. 1935, crapter 110, sections 63 (c) of subsection 3 and paragraph (f) of section 92, pages 2-34 and 2447.) The cointen in the Kiess case is only obstracted, and our sustract one not, as we understand, correctly state the law on this point, was actionated to solitary fight ont to another and ob redied defendant contends, a reversal without remandment in any case where an issue of fact has been properly submitted to a jury. In cases of trial without a jury this court may consider the facts and enter in this court the proper judgment without remanding the cause for a new trial, but that rule is not applicable where the trial is by jury, and the Civil Practice act has not changed the law in this respect. Illinois Tubercular Association v. Springfield Marine Bank, 282 Ill. App. 14; Capelle v. C. & N. W. Ry. Co., 280 Ill. App. 471; McCarthy v. Rerrison, 283 Ill. App. 129.

Defendant, however, further contends that at any rate the judgment should be reversed and the cause remanded for another trial. One of its contentions in this respect is that the trial court, over the objection of counsel for defendant, permitted appellee to testify that Mr. Leach, vice-president of defendant, said to him in July or August, 1935, in substance that he was entitled to the commissions claimed; and that under his contract he was only required to bring in the orders to entitle him to his commission.

Defendant says that there was no proof that Leach had anything to do with paying plaintiff's commissions or passing upon the question as to when his commissions were earned; that he was not hired by Leach, but that his employment was determined upon at a meeting of the directors of the defendant group held in New York, where the accounting office of defendant was located.

The testimony probably had considerable weight with the jury for the reason that the conversation was not denied by Leach, a although he was witness for defendant. Defendant cites Hoke v. Harrisburg Hospital, Inc., 23k Ill. App. 247, and Scoville Mfg. Co. v. Cassidy, 275 Ill. 462, cases we think clearly distinguishable. Leach, as a matter of fast, was in charge of the Chicago office, where plaintiff had his headquarters, and plaintiff's work was

defends t contends, a reversal violour considers, where an issue of fact has been projecty and the control of the control of the fact of the control of the

Judgment should be reversed and the class returned for another trial. One of the contentions is write respect to a live trive court, over the objection of counsel for deferment, over the objection of counsel for deferment, of period and pelies to testify that we have testify that we have to him in July or August, 1955, in the content of the continued as a city of to the continued of the content of the continued of the orders to wait in the testion of the orders to wait in the continued to the continued that the continued to the defendent responds the continued to the defendent of the defendent

 carried on largely under his direction during the three years plaintiff served the defendant. Leach also conducted the negotiations which resulted in the employment of plaintiff. Plaintiff had been referred to Leach in that regard by the president of defendant, and Leach communicated to plaintiff the decision of the board of directors that he should be employed. No evidence was introduced tending to show that the authority of Leach was limited in regard to the matter in controversy, and we hold that in the absence of the president and under all the circumstances the conversation was admissible, its weight being for the jury. Vincent v. Seper Lumber Co., 113 Ill. App. 466; Union Surety & Guaranty Co. v. Tenney, et al., 102 Ill. App. 95; affirmed in 200 Ill. 349.

Defendant also contends that the court erred in sustaining an objection to the testimony of one Karshaw, called by defendant. The court sustained an objection to a hypothetical question propounded to this witness calling for his opinion as to how long an "Account Executive" or solicitor or salesman "must service that account." As a matter of fact, the witness had in response to a prior interrogatory answered the question in substance. There is some question as to whether the witness was qualified as an expert concerning the Outdoor Advertising business, and we hold the court did not err in sustaining an objection to this question.

It is contended that the court erred in giving at the request of plaintiff the 15th instruction, which was to the effect that if the jury should find the issues in favor of the plaintiff, "then you should assess the plaintiff's damages in the sum of \$2353.53." If the plaintiff was entitled to recover at all, the amount was not in dispute. The fact that plaintiff obtained these orders from advertisers who theretofore had not been customers of defendant and the amount paid by them to defendant are undisputed. There is no dispute as to the computation or the credits which should

tiff served the defendant, head has consisted the indications which resulted in the ending of of all shorts. In this defendant, and referred to head in the endinger of the transferred to head for the transferred to plaintify he considered to the terms of historia that he should be endinged. It entires as introduced ending to show that the admosting of head well in regars of the matter in controversy, had we also see in the head of the opening dent and under all the chief theorem is conversationed and under all the chief theorem is conversationed and under the first or fire in the paint for the jury. Windows to converse the admissible, its weight being for the jury. Windows to converse the first life the first of the first with the first of the first

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There is no dispute as to the computation or the traitts which which

be allowed. Defendant offered no evidence from which the jury might find that it had been damaged by the alleged failure of plaintiff to service the accounts, and therefore, if the jury was of the opinion, as a matter of fact, that plaintiff was entitled to recover, there was no question as to the amount of its verdict. There was no error in giving this instruction. Defendant also contends that the court erred in refusing to give, at defendant's request, the following instruction:

"The court instructs the jury that if you believe from the evidence that plaintiff's contract of employment not only required him to obtain contracts for advertising but that it required him to render various services until the expiration and completion of said advertising contracts, and if you further believe from the evidence that the advertising contracts in question in this case required further service to be performed by the plaintiff after he quit the employ of the defendant, and that said resignation was without cause on the part of the defendant, and if you further find that the plaintiff offered to render said services but that he placed himself in an improper position so that he was unable to render said services by entering the employ of a competitor of the defendant, then and in that event the plaintiff cannot recover commissions accruing after he quit the employ of the defendant and your verdict should be for the defendant."

The court refused to give this instruction, which refusal was one of the reasons urged by defendant upon the motion for a new trial and for judgment non obstante veredicto. This instruction was in substance covered by given instructions No. 4 and No. 5. It was not necessary that the court should instruct the jury twice as to the same propositions of law. Such instructions tend to confuse rather than to clarify the issue submitted to the jury.

Defendant, however, earnestly contends that the verdict and judgment are manifestly against the weight of the evidence. It is said that the appellee was his own sole witness; that his evidence was in some respects contradictory, and that upon every issue in the case he was contradicted by from four to eight witnesses. Defendant cites cases such as <u>Donelson v. East St. Louis Ry. Co.</u>, 235 Ill. 625; <u>Mabel v. C.C.C. & St. Louis R.R.Co.</u>, 264 Ill. App. 532; and <u>Walters v. Checker Taxi Co.</u>, 265 Ill. App. 329, to the

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might find that it had been dishaged by the alloger fail as off plaintiff to service the accounts, the clear of the opinion, as a nation of fact, that plaintiff was a dished to recover, there was no question at the amount of its verticet.

There was no error in diving this instruction. Defendant also contained that the court erred in refirm to the defendant also conquest, the following instruction:

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point that it is the duty of the trial judge to set aside a verdict which is manifestly against the weight of the evidence. There is no doubt of that rule. It has been followed in this court in innumerable cases. The evidence in this case is not, however, so onesided as defendant seems to think. There is a sharp conflict in the evidence as to whether, while discontinuing his agency for the company, plaintiff offered to perform any services, the need of which would arise thereafter in connection with these accounts, but the evidence to the effect that he was not asked to render any such services is uncontradicted. There is a very clear reason why such request was not and would not be made which is, that requests for such services furnished to solicitors fine opportunities for securing other and future orders for themselves. Any further orders plaintiff might secure were to go into the new agency with which he had become connected. There is no evidence in the record tending to show that it was agreed between the parties at the time plaintiff was hired that upon quitting the services he should forfeit commissions on accounts already taken unless he continued to render these services with relation thereto. There is much testimony to the effect that, generally speaking, in this business one who acted as a salesman or solicitor was expected to supply such service when needed. Quite naturally for the reason already given, namely, the opportunity of obtaining other and further contracts, such services would be performed upon request with alacrity.

We think the situation which arose was not in contemplation of the parties at the time of the making of the contract, nor provided for by any of its terms. The parties are agreed there was no provision in the contract as to the duration of the employment, and that it could be ended by either party at any time. The law of contracts with reference to conditions where, as here, performance of one promise extends over a period of time and the other does not.

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is stated in the Restatement, Contracts, Section 270, to the erfeet that "the duty to fulfill the latter promise is, except as stated in Section 268 (2) conditional on the completion of the former, if the contract does not indicate the contrary by fixing dates or otherwise." In conformity with that rule, the courts of Illinois have held in numerous cases cited in the Illinois Annatations to the Restatement. Section 270, that a plaintiff may not recover for labor performed when he has wrongfully failed to work out the entire contract period. Here, however, no contract period was named by the parties. The contract in the very nature of things was divisible as to each account. Plaintiil contends that under the terms of the contract payment was due without regard to future services on the account. He also contends that he offered to perform such services. Issues of fact in these respects were submitted to the jury, which saw and heard the witnesses, and the trial court has approved the verdict of the jury. The fact that there was only one witness called for plaintiff while several testified for defendant, is not at all conclusive as to the weight of the evidence. We have often said that in this court the evidence is not counted but weighed. We have already, in connection with another objection, pointed out that the statement of the vicepresident, Mr. Leach, in which liability of defendant was practically conceded, is not denied. Many of the witnesses for defendent testified to matters which we think wholly immaterial. Defendant offered no evidence tending to show that it was damaged by any failure of plaintiff to service the contracts for which he sues. We cannot say that the verdict is manifestly against the evidence.

Rule 7 of this court requires that "except on the coverate parties shall be designated plaintiff and defendant, as in the trial court. This rule was not followed in the briefs filed

is stated in the Mestalement, Continuis, section 27., t tue cifeet that "the duty to fulfill the lover promise is, except as stated in dection 268 (3) conditional on the couplition of the former, if the contract loss not indicate the contrary by liming dates or otherwise." In conformaty that and true, the loades of -ito an sio __i to the case sate i broi i test sand in bled san sioniiii tions to the Restatedent, Section Sh , that a granual as not recover for labor performed when he has aren fully fail.) to "ork out the embire contract period. Lere, however, no contract period The control of the parties. The control in the remed by things was divisible as to coch account. In it it is contends things so brayer trouble sales the many teartnes will be sured will rebur future services on the account. He shan contends out the off red to perform such services. Issues of it these respects were submitted to the jury, which saw and hear withers, and the trial court mas approved the verdict of the dary. The first unit there was only one witness called tor other tiff will entered t tified for defendant, is not at al. ancincive as to the weight of the evidence. We have often sai trat in this court the evi of the is not counted but weighed. We have them, , to connection with another objection, pointed out same the send of the viceprosident, Mr. Leach, In w ion listility of reformative practically conceded, is not demicd. .amp or the situessee for Portendent testified to metters while we will receif tear to beitised ins fendant offered no evidence tending, to thow that it was the med of soldware etaerinos out solvans of felialisty to saudist yes yo We cannot say that the verdict is mentioned aw suee. evidence.

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in this case. Compliance with the rule would have lessened the labors of the court.

The judgment is affirmed,

AFFIRMED.

O'Connor and McSurely, JJ., concur.

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The judgment is abitaned.

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O'Connor and Meourery, JJ., coreur.

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OTTO W. SCHLAU

VS.

A. MUELLER.

Appellee.

APPEAL FROM MUNICIPAL COUNT OF CHICAGO.

287 I.A. 6

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff sought to recover rental of \$90 for November. 1935, for an apartment vacated by defendant in October; upon trial plaintiff suffered an adverse verdict and appeals from the judgment.

Plaintiff's case rests upon a provision in a written lease to defendant expiring April 30, 1935, that the lease would be extended from year to year after its expiration unless either party gave the other not less than sixty days previous notice in writing of his intention to terminate the lease upon its expiration. No written notice of termination was given and defendant continued to occupy until October 30, 1935, paying all rent to November 1st.

Plaintiff argues that the lease was by this provision automatically extended for a year. Defendant contends that there was an oral agreement between the parties that after the expiration of the lease the tenancy would be on a month to month basis.

The evidence before the jury showed that defendant first leased the premises from plaintiff in October, 1931, and signed a one year lease; at the expiration of that lease another was signed. and again, at the expiration of that lease defendant signed another for a year, which expired September 30, 1934. Defendant testified that at this latter date, , when the matter of another yearly lease was under consideration, he told plaintiff he did not wish to obligate himself for a period longer than six months as he was looking

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Plaintiff's case rests uson a provision in a relater lease to defrotont expiring while st, 1807, sone to lease and be extended from year to year after its explication as near after the party gave the other not less than civil, and the store to less the writing of his intention to term in the last last on a less start tion. No written not see of the intention to relate the last last last object that it occupy until betier in, i.e., we have all real to decapy until betier in, i.e., we have all real to decape and the start in the start in the last related to decaps until betier in, i.e., which all real to decaps until betier in, i.e., which all real to

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around for a home and when he found a satisfactory place he would move from the apartment; that because of this it would not be necessary for plaintiff to do any decorating in the apartment; that plaintiff thereupon prepared the new lease, which was executed by both parties, running from October 1, 1934, to April 30, 1935, a period of seven months.

About March 1, 1935, plaintiff left another form of lease at defendant's home, leasing the apartment for a year, commencing May 1, 1935, ending April 30, 1936; thereupon defendant told plaintiff he was still looking for a home and did not care to obligate himself on any lease and that as soon as he found a home he would move; that plaintiff said this was "satisfactory." The form of lease for a year, commencing May 1, 1935, was never signed by defendant and no request was made to him to sign it. In September, 1935, defendant notified plaintiff's wife that he was going to move and told her to inform her husband; later defendant told plaintiff he was going to move and plaintiff objected, and some argument followed as to whether defendant was responsible by virtue of the sixty day provision in the written lease from October 1, 1934, to April 30, 1935, upon which plaintiff is suing. Defendant moved October 30, 1935, and returned the keys by registered mail.

The jury could properly believe that there was an oral agreement between the parties that after the expiration of the lease on April 30, 1935, defendant should occupy on a month to month tenancy. It is well settled that it may be shown by parol that the parties have agreed to terminate the obligations of a written lease. McNeill v. Harrison & Sons, Inc., 286 Ill. App. 120; Jacob v. Mundell, 267 Ill. App. 160; Weber v. Powers, 213 Ill. 370; Hymen v. Anschicks, 270 Ill. App. 202; London Gusrantee & Accident Co. v. Steinberg, 264 Ill. App. 31.

around for a home and when is found a satisfactor; place is would move from the apartment; that because of this is would not be necessary for plaintiff to do one decorating in the apartment; that plaintiff thereupon present the new lesse, which was executed by both parties, running from October 1, 195., to April 3., 1956, a period of seven months.

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Plaintiff asserts it was error to admit in evidence, at the instance of defendant, a letter sent from plaintiff's attorneys to defendant prior to the institution of the suit. It is contended that it prejudiced plaintiff before the jury in that the letter implied that plaintiff in October, 1935, prior to the date defendant vacated the premises, did not believe defendant was occupying under the extension provision of the lease upon which he is relying in this suit. The letter was written by the same attorneys who prepared the statement of claim and who tried the case in the trial court. It purported to state plaintiff's theory of his claim, and if this was not consistent with the claim made in his statement of claim in this action defendant was entitled to show this. Stave v. Great A. & P. Tea Co., 262 Ill. App. 221.

The question involved is principally one of fact. The jury accepted the evidence of the defendant and found accordingly. We cannot say this is against the manifest weight of the evidence.

The judgment is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

Plaintiff seserts it was error to do in the evidence, it the instance of defandant, a letter sent from plaintiff's attern eye to defendant prior to the institution of the suit. It is contended that it prejudiced plaintiff before the fary in the the iert rise plied that plaintiff in Cotobar, 1950, order to the defendant under vacated the premises, sid not believe forth it san objection on the tendent the extension provision of the improve forth the in the refundation of the improvision of the improvision of the improved the state error of claim and who the improved the state error of claim and who the improved to the claim in the state end of if this was not consisted that the claim in the state end of claim in this action defendant was end. If the consisted the feach of the claim in this action defendant was end. If the constitution of the claim in this action defendant was end. If the constitution defendant was end.

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The judgment is affirmed.

AFFIRATE.

Matchett, P. J., and O'Cornor, J., concur.

39 006

ALICE GALTER (LIGHTER),
Appellant

VS.

LOUIS GALTER.

Appellee,

OF COOK COUNTY

287 T.A. 62

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a decree which modified a former decree touching the custody of a minor child about four years old.

January 25, 1934, a decree of divorce was entered in the Superior court dissolving the marriage relation between the parties, and the custody of the child, Rachel, during minority was awarded to the mother, except that defendant should have the right to visit and be with the child at least three Sundays of each month and also have the right to her care and custody during the summer vacation of each year.

Plaintiff remarried January 31, 1935, and is now known as Alice Lighter. June 12, 1935, defendant filed his verified petition setting forth the provisions of the decree with reference to the custody of the child and alleging that plaintiff was no longer a fit person to have custody of the child because of her new marital status; that her husband, Stephen Lighter, is not a fit person to reside in the same household with the minor child; that certain influences have changed plaintiff's mentality to the point of mental abberations, and that she has threatened to take the child out of the jurisdiction of the court in order to defeat defendant's visitation privileges. Petitioner asked for a modification of the decree of January 25 and that the custody of the child be awarded to him, or that the terms of the decree be so modified that defendant would have custody of the child at certain specific and reasonable periods of time each week and during the summer, and particularly

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After hearing exidence the court modified the decree with respect to the visitation rights of the defendant and ordered that he should have the child under his care and custody during the first three week-ends of each month until the further order of court, and also during one month of each summer vacation period, defendant to select the month, notifying plaintiff of the time thirty days in advance. Both parties were restrained from taking the child out of Illinois for other than vacation periods without the written consent of each other or an order of court. Plaintiff appeals from this order and argues that the court in making these modifications abused its discretion.

In such a proceeding the court may, on application from time to time, make such alterations with reference to the custody of children as shall appear reasonable and proper. Ill. State Bar Stats. 1935, chap. 40, par. 19. Stafford v. Stafford. 299 Ill. 438. And where conditions have changed since the entry of the original order, the court has discretion to modify it. Thomas v. Thomas, 233 Ill. App. 488.

It is unnecessary to relate at length the testimony presented on the hearing. For the most part it consists of recriminations. Defendant testified that in February, 1935, he was told that he could not take the child any more, and that from that time until June, 1935, he was unable to see her; that although he attempted to have the child during the summer, as provided for in the original decree, yet he was unable to do so; that when he called for the child in August plaintiff told him he could not have her; that atone time he attempted to talk with the child over the telephone and plaintiff told him she was very ill and could not come to the telephone; thereupon defendant announced that he was going immediately to see the child and plaintiff replied. "I won't let you in"; that when he

over the week-ends.

After nearing emission ripute court modified the fecree with respect to the visitation ripute of the defendant and ordered that he should have the child under his case and custody during the first three week-ends of each month until the further order of court, and also during one month of each subsect vector period, defendant to select the month, hotilying laintiff of not that thirty days in advance. Both serties were restriked from that the child out of Illinois for chart that we featitied for other or an order of court. Plaintiff the written consent of each other or an order of court in a same these modifications abused its discretion.

In such a proceeding the court way, he applies tion from time to time, make auch alterations with reference to the custody of children as shall appear reasonable and proper. iti. otate dar State. 1935, chap. 40, par. 19. Stafford v. etafford, 209 lil. 438. And where conditions have changed since the autry of the original order, the court has discretion to addity it. company. Thomas, 235 lil. App. 438.

It is unnecessary to relate it length the test ony proserted on the hearing. For the most part it consists of recri institute.

Defendant testified that in February, 1955, to mas told that he could not take the child any more, at that from institute about Jame, 1935, he was unable to see her; that although he offers do nave the child during the summer, as provided for in the original secree, yet he was unable to do so; that when he called for the criff in August plaintist told him he could not have her; that atome the he attempted to talk with the child over the telephone and daintist told him she was very ill and could not come to the telephone; that thereupon defendant announced that he was roing immediately to see the child and plaintist replied, "I won't let you in"; that then he

went to plaintiff's home he was not allowed to enter or to be alone with the child, plaintiff saying that she must consult her husband, meaning Mr. Lighter; that in February, 1935, plaintiff told defendant he could not take the child any more; that he might call and see her for a few minutes once in awhile; that on one occasion when he called he found that the child could not stand and, inquiring of plaintiff as to the cause, was told that the child was "cranky - she wants to have her own way"; defendant was told that she had been isitting on the floor, refusing to stand up, for about two weeks; upon defendant's insistance the child was taken to a hospital and X-rayed and definite fractures of the bones of a leg were found; that plaintiff never explained how this happened.

On one occasion a sister of defendant, as was her habit, sent the child a gift which was returned with a note from plaintiff saying, "we have no use for any gifts from you." Another sister of defendant testified that when in Movember, 1935, she came to Chicago, she telephoned to plaintiff that she would like to speak with Rachel, the child, as she had not seen her for over a year, and was told she could not see the child, but to get in touch with plaintiff's lawyer; that she replied she was coming to plaintiff's home to see the child but was warmed not to do so.

The chancellor also heard evidence tending to show that Stephen Lighter, husband of plaintiff, was an unfit person to associate with a young child. On one occasion when defendant called for the child Lighter abused him with swearing and obscene epithets and threatened to have him "bumped off" if he did not leave the house. Counsel for defendant asserts that the court also considered a report of the Bureau of Public Welfare, but we do not find it in the record.

The question is whether, upon the evidence, of which we have narrated a small part, the court abused its discretion in modifying

ment to obtain tiff's nome he was not allowed so wast or to to alone with the could, plaintiff as ing that at and last one if the resident of the could not then the that in deiman, then, plaintiff toud defends at he could not then the child the could not the high that on see her for a few minutes of sein as in assist to a one occasion and he called he found that the could not staid in a inquiring of plaintiff as to the cause, was told that the cause of a could cause for hed been taitting on the ilour, rey"; defender was total cast for hed been taitting on the ilour, referring to the ilour, respital been taitting on the ilour, referring to the ilour, respital weeks; upon defendant's insistance in this test of a leg were found; and X-rayed and defendants of the comes of a leg were found; that claiming the explained her unis har leg.

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the decree. It is well established that where the evidence is conflicting the conclusion of the trial court, who heard the evidence and observed the witnesses, should not be reversed unless manifestly against the weight of the evidence. Garvy v. Garvy, 282 Ill. App. 485; Floberg v. Floberg, 358 Ill. 626.

The modification which is challenged is not drastic but reasonable, and the chancellor did not abuse his discretion in entering the order. It is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur,

the decree, is well so olionared. I out visioning the conclusion of the bright court, and included evidence and observed our vitaries is, anough of an inverse; unless manifestly softer the olioning of the court of

The modification will is order, and is not interested as reasonable, in the classestion is not end as dispression in entering the order. It is militare,

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matchett, i. '., said C'Ocador, J., cincur.

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FILLA KOLB

RTRUDE KOLB, nee TRUDE CABRIEL.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

287 I.A. 623⁴

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

This is an alienation of affections suit, tried by the court, in which after hearing the evidence the court found for the defendant, and plaintiff appeals from the judgment.

Plaintiff's brief has wholly disregarded Rule 7 of this court and might well have been stricken. However, in the interests of economy to the litigants we have considered the case on its merits.

Only questions of fact are presented. Norbert E. Kolb and Ella Kolb, plaintiff, were married October 10, 1921; it was not a happy marriage: the couple were "scrapping and fighting" constantly: Kolb testified that his wife would not have children. Kolb, while continuing to live with his wife, was unfaithful to her and had illicit relations with other women; in 1931 he lived for about six months in Indianapolis, having improper relations with another woman; he first met defendant, Gertrude Gabriel, in January, 1932; he told her his name was Tom Rourke as he did not want her to know he was married; in July, 1932, he first told her he was a married man and that his right name was Norbert Kolb, but he also told her he was separated from his wife; that divorce proceedings were in process and that as soon as he obtained a divorce he would marry her. Kolb testified that when defendant learned he was a married man she and her mother told him to quit paying attention to defendant, and that he threatened to shoot her if she should quit him.

In October, 1932, Mr. and Mrs. Kolb apparently agreed upon

MILA LOLB,

GERTRUDE KOLB, nee

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MR. JUSTICS MCSCHOLDT BLD IVERGE THE OPINION OF DA COURT.

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Only questions of for are presented. . The solite and Ella Kolb, plaintiff, were married detable it, 1921; if the set a happy marriage; the couple were "screpping and it stant" couple with Molb testified that his wife would not a ve welltren. Lolf. wille continuing to live with the car , who are to the or m and and illicit relations hit ather wors; in lost he lived for about eigh menths in Indianapolis, anving improper for timer too anglier Woman: he first met del mident, Gertrude a trial, to Jua ry, 1,30: he told hor his name was for nourke as ! if it was br to but he was married; in July, 193", or fire the ner to was a terried man and that his rive eras or rt oli, the leath har the was separated from the wife; not diverge any so process and t at as soon a her chained a livered at the digrap her. Noib teasified tunt when don't dant' I amed he as a criter man she and ner motier told the to get the same with the to tefendant, and that he threatened to short ser if ohe could wit him.

In October, 1932, Mr. and are. . alb apparently serred upon

a divorce and December 1, 1932, an agreement in writing was entered into by them reciting that they were separated, not living tagether as husband and wife; that it was their desire to settle the property rights of each and it was agreed that Norbert Kolb should pay to Ella Kolb \$19,000 in full settlement of all claim she might have against him by virtue of the marital relation. Apparently it was agreed that Kolb should go to Reno, Nevada, to obtain a divorce. and it was stipulated that attorneys in Reno should file Ella Kolb's appearance in the divorce proceeding. After he had been in Reno a few days he received a telegram from plaintiff saving the house had been robbed, and he returned to Chicago, not having obtained a divorce. He then told plaintiff about defendant and brought defendant and her sister to meet his wife; all the parties had dinner together at Kolb's home; at another time what was called an "engagement party" was held, at which Mrs. Kolb and defendant and other members of both families were present: at this party Kolb gave defendant an engagement ring. Kolb testified that Mrs. Kolb never raised any protest to his going with defendant or becoming engaged to her; that she was willing he should marry defendant provided she, plaintiff, could get another husband: that Kolb was active in this and matramonial advertisements were placed in a newspaper and prospective husbands were interviewed by plaintiff, accompanied by her husband. Mrs. Kolb denied the testimony of Mr. Kolb that she was interested in getting another husband. Plaintiff procured a divorce from Kolb in January, 1934, and he married defendant in February.

Defendant argues that the record shows that long prior to the time defendant met the husband he had lost all love and affection for his wife and was living a life of unfaithfulness toward her; that there is no evidence of any acts on the part of defendant

a divorce who love ber i, item, moveled to the sure into by them reciting that they were scharted, no as hasband the vife; Else, I sir d bit a least o preperty or you bereas the day how take wear, the all had foss to estadia Ella bolb \$19.000 in I'dle south of a fair of 500.018 diod sile against his by virtues of one emarked roll to h. As then a it was agreed that holb should so to home, isvade, to be it a lvotue. all will as a cart al sycatodis send bet hagine asw it bas Relation of the contraction of t in Romo a few days as received a tracersh for girl off; all a the house had been robbed, and as returned . one ga., factor of the state obtained a divorce. Se the tolo shinit or wint defendant and nor citer to meet his ine; it the parties had dinner together of this office of at a contract age. bus dad . . . ion is in the ten Tytue called an "engagement to tendent and other am tendent in the average was to bus design the this party fold gave terminant an er and training and that Mrs. Aolb . ever relead any .r. seet : in vion delegashows on an interest of the mean of hear and and coold to the marry defendant provided and, oldining and the mother us and tust Kolb was active in the and sare sometry veriferests were placed in a newscaper and produce two sauda ore intervened by plaintiff, accompanies of the transfer of the tip it tip testion, which and the mas interacted in terminal to the testing and the testi husband. Plaintif or oured a divorce from boll is a charry, 1934, and he married for a to b to Beerdary.

Defendant argues that the record western line, print to the time defendant met the mashand or or like will live on with the time side and was living a little of antimitationess exert ther; that there is no evidence of any wats or the part of a living alt

tending to alienate the affections of the husband, and that the actions of the husband in wooing defendant and becoming engaged to her were with the consent of plaintiff.

The trial court in his opinion finds that defendant was socially accepted in the family of the plaintiff, knowing that Kolb expected to marry her, and that no word was said to defendant that she was doing an injustice to the wife. Plaintiff did testify that at one time she went to defendant and asked her to release her husband or let him alone. This was denied by defendant, and there was other definite testimony tending to discredit plaintiff's story in this respect.

When plaintiff procured her divorce she received, in addition to the \$19,000 previously received by her, the sum of \$6500 paid to her by the husband. The trial court found that plaintiff had willingly parted from her husband for a consideration, that what was done by defendant could not possibly have been done without the aid of the wife, and that if there was a conspiracy the wife participated in it.

We are of the opinion that this conclusion was justified, and the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and O'Conner, J., concur.

tending to alienate the affects on the solution of tions of the imabined in worse, destrictions of the content of the litter.

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We are of the opinion that will and the judgment is affired.

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Matchett, P. J., and C'omo, ., our .

GRORGE A. GILES,

Appellee.

VS.

GRADY & NEARY INK COMPANY, a Corporation, Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

287 I.A. 62

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendant to recover \$86.75 for "wages and commissions for services rendered by the plaintiff to the defendant as a salesman. " Plaintiff also claimed \$25 for his attorney's fees. Defendant was defaulted for want of appearance and plaintiff's damages were "assessed by the Court on Affidavit of Claim" at \$111.75. More than 30 days after the judgment was entered, the court on defendant's motion opened up the judgment and gave it leave to defend, Plaintiff appealed from this order to this court where the order of the trial court was reversed. (No. 38587, Giles v. Grady & Neary Ink Company.) In the opinion there filed we said. "In the instant case the record discloses that defendant neglected to appear, although it was served with summons: therefore the court was not warranted in opening up the judgment.

"And while the record discloses that the court was not warranted in entering judgment against defendant on his statement of claim because it was not verified, yet that question is not before us on this appeal. And as said in the Lynn case (279 Ill. App. 210 - 214): 'Defendants may have some relief, but it is not by a proceeding such as this. "

Subsequently defendant filed a petition in this court for leave to appeal, which we have heretofore granted. And, as stated in our former opinion, plaintiff's statement of claim was not verified. Defendant was served with summons but failed to appear. it was defaulted for want of appearance, and the court assessed the

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GRADY & WHARY INK CU.PARY, a Corporation,

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AR. JUSTICE O'UDENOR DEAL' ARE IN OPENIE. IN THE TRANSPORTER

Plaintiff brought sait _ hat i respective or reconstance of the \$86.75 for "wages and consider one for servicing the reconstance of the definition as a sometime." And if it also chained \$25 for his attermey's fees. Definite the definition of algorithme and plaintiff's damages were "the definition that on appearance and plaintiff's damages were "the definition of the tourt on Affidavit of their at alliance that it are a days of the formation of the format was entered, the court of definition of the first stand gave it leave to defend, it indicate appealed from the order to this court where the crise of the crise of the court the self-the indicate of the theory of the there filed we self, "In the industry of the court said appears, although it has served with subject therefore the court was no very at the crise of the defendent neglected to appear, although it has served with subjects.

"And while the record dischase to the court case of warrented in entering judy, or a wainst to the court of the same of claim because it was not verified, so to the action as not entire as on this appeal. That we had be a the control of the same as on the appeal. That we had be a the control of the same and the same and the same as a proceeding such a thin."

Subsequently defindant fill of the Line is the Line of the Line of the appeal, which we down in retaining the countries of the second in our former opinion, plaintiff's the second verified. Defendant was served with an end of the countries of the it was defaulted for want of annearm on, and one will a second the

damages on plaintiff's "Affidavit of Claim." There was no affidavit of claim filed on behalf of plaintiff, as required by Rule lll of the Municipal court, and the judgment was erroneous.

But plaintiff contends that the judgment was entered in accordance with the provisions of the Civil Practice act. If we assume that the Civil Practice act applied, which we do not decide, there is no merit in plaintiff's contention. Section 57 of the Civil Practice Act, chap. 110, Ill. State Bar Stats. 1935, provides that where plaintiff brings an action upon a contract, express or implied, and files "an affidavit * * * of the truth of the facts upon which his complaint is based and the amount claimed (if any) over and above all just deductions, credits and set-offs (if any), the court shall, upon plaintiff's motion, enter a judgment in his favor for the relief so demanded, unless the defendant shall, by affidavit of merits filed prior to or at the time of the hearing on said motion, show that he has a sufficiently good defense on the merits to all or some part of the plaintiff's claim to entitle him to defend the action."

No affidavit to his claim having been filed by plaintiff, it was error for the court to enter judgment.

The judgment of the Municipal court of Chicago is reversed and the cause is remanded for a trial on the merits.

REVERSED AND REMANDED.

Matchett, P. J., and McSurely, J., concur.

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PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,

YS.

PETER G. DeMET,
Plaintiff in Error.

EUROR TO MUNICIPAL COURT OF CHICAGO.

287 I.A. 624²

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

An information was filed charging that defendant, Peter G. Deket, was president of the Publix Profit Sharing Cafeteria, a corporation, which was conducting a restaurant in Chicago, and that it failed and refused to file a return with the Department of Finance of the State of Illinois, as required by the statute (sec. 3, chap. 120, Ill. State Bar State.); that Deket directed and controlled the business of the restaurant corporation and aided, assisted and encouraged it in the violation of the law. There was a trial before the court without a jury, Deket was found guilty and sentenced to confinement at labor in the House of Correction of Chicago for a period of six months and a fine of \$5000 was imposed; he prosecutes this writ of error.

Defendant relies for reversal on the law as announced in the case of <u>People v. Duncan</u>, 363 Ill. 495, where it was held that one cannot be imprisoned as an accessory before the fact under the provision of the Criminal Code for violation of the Motor Fuel Tax Act, where the principal is a corporation, because an accessory before the fact cannot, under the law, be more severely punished than his principal.

In that case an indictment was returned against Duncan charging that, as an accessory before the fact, he was guilty of violating the Motor Fuel Tax Act in that his principal failed and refused to report to the Department of Finance the sales of each month. Duncan was president of the Blue Rose Oil Company, a cor-

PEOPLS OF INE STATE OF LLALFOLS, Defendant in Wirst.

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PETER G. DeMET,

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238 A.I.Y. 624

BR. JUSTICE O'COALOR DELIVERS THE UPILL A OF THE SOULL.

An information was filed clared to the description of the clark of the components, was president of the description of the component of that it failed and refused to file a return set, he Department that it failed and refused to file a return set, he Department of Finance of the State of Illinois, as required by the state tate and centralled the business of the restaurant condition and aided, assisted and encouraged it in the violation of the law.

There was a trial before the court without the cone has found guilty and sentenced to confinence to lawor to the cone of the court without the the cone of the restion of the cone of the court without the the cone of the court without the the cone of the court without the the cone of the court restion of Chicago for a period of six menters and a fine of procedute this writ of error.

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In that case an indictment was returned sained number charging that, as an accessory before the f ct, he was litty of violating the Motor Fuel fax act in that his principal failed and refused to report to the Department of the sains of cacomonth, Duncan was president of the Elas Kone Cil Contony, a cor-

poration, and virtually controlled its policies. The Court said that the Accessory Statute, sec. 2, div. 2, chap. 38, which defined andaccessory, provided that he "shall be considered as principal, and punished accordingly," and that the penalty for a violation of the Notor Fuel Tax Act by the principal was a fine not to exceed \$5000 or imprisonment in the penitentiary for not less than one year or more than five years, or by both such fine and imprisonment. The Court also said (p. 498): "The penalty provisions of the Motor Fuel Tax act cannot be applied to imprison/natural person who is an accessory before the fact, where his principal is a corporation. To that extent we hold by this opinion, that the accessory statute, dealing with accessories before the fact, is repugnant to and cannot be harmonized with the penalty section of the Motor Fuel Tax act involved in this case."

In the instant case Deket is charged as an accessory before the fact, and the penalty imposed by section 13 of the
Retailers' Occupation Tax Act (par. 438, chap. 120, Ill. State Bar
Stats.) is a fine of not more than \$5000, or imprisonment in the
county jail for not less than one month nor more than six months,
or both fine and imprisonment, in the discretion of the court.

We see no substantial difference between the provisions of the Metor Fuel Tax act, involved in the <u>Duncan</u> case, and the section of the Retailers' Occupation Tax act. In fact, counsel for The People in their brief admit that the Duncan case is in point, but argue that the decision in that case is wrong. Obviously this contention is without merit and cannot be entertained by this court.

The judgment of the Municipal court of Chicago is reversed.

JUDGMENT REVERSED.

Matchett, P. J., and McSurely, J., concur.

poration, and virtually controlied its volicies. The lower said that the Accessory Statute, isc. 2, div. 2, duap. Sd, million of fined and scassory, provided that he densidered as principal, and punished accordingly," and that the peaking, or a violation of the motor fuel intended in principal eas a fine not to exceed \$5000 or imprisonment in the peatitemilary for not less than one year or more than five years, or by lot, such fine end imprisonment. The Court also waid (p. 493): "and paranty provisions of the Motor Fuel Tax act can ot be in list to increasing person who is an accessory vefore the first original accessory statute, dealing with accessories trained that increasing to and cannot be har conized with the peaking the fact, is repugnant to and cannot be har conized with the peaking section of the Motor Fuel Tax act involved in this case."

In the instant case DeWet is charged as at ecoercity terfore the fact, and inc penalty imposed by section to of the Retailers' Occupation Tax Act (par. 400, cht. 100, ill. State ber State.) is a fine of not more than \$5000, or is riseness in the county jail for not less than one month nor the than six maths. or both fine and imprisonment, it is a literation of the court.

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The jungment of the wunic put court of latenge is reversed.

Matchett, P. J., and hedurely, J., soucar.

HAROLD F. PAGE,
Appellee,

VS.

CHARLOTTE C. PAGE, Appellant. 58

OF COOK COUNTY.

APPEAL FROM SUPERIOR COURT

287 I.A. 624

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit for divorce July 22, 1931, charging that defendant deserted him "without any reasonable cause for the space of one year and upward and has persisted in such desertion to the present time." Defendant filed her answer, denying the charges and averred that plaintiff and defendant had cohabited as husband and wife as late as August, 1934. The case was heard before the court without a jury, there was a decree awarding plaintiff a divorce, and defendant appeals.

The record discloses that the parties were married August 25, 1928, separating October 13, 1928; that they again lived together July 18, 1931, for a period of four days, and plaintiff claims they have not lived together since July 22, 1931. On the other hand, defendant's position is that they lived together for short periods of time intermittently as late as August, 1934, which was six months before the filing of the bill.

Defendant contends that the finding of the court in plaintiff's favor is against the manifest weight of the evidence. Practically all of the material evidence is the testimony of plaintiff and defendant.

The evidence shows that defendant attended the University of Chicago from which she graduated in 1923. Her mother died when she was a small child and she was raised by her aunt, living with the aunt, the aunt's husband, and defendant's father; that she met plaintiff in 1923 while she was/attending the

HAROLD A. P.GE, Ap. eliee.

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CHARLOTTE C. EAGE,

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287 I.A. 624

Plaintiff brought buit on isomos of good, int, and that defendant deserted him "without a good one lear and upsart and nessested in an economic. to the present time." Defendant filed or allway, engal the charges and average that plaintiff as lete as august, it is a conservation of the court without a jury, there is a reason and wife as lete as august, it is. I say a conservation of the court without a jury, there is a reason and and plaintiff a diverce, and defendant a cur.

The record like uses that has press or earning and at 28, 1920, separating actuals rule, 1920; and actual transfer fully 13, 1931, for a period of sour fig., and activity claims they have not lived to be actual for each rule. In a the other hand, defendant's nos time is the large lived souther for each article of the interface of the half of the filters are actually as are an angles, 1914, which was six souths before the filters and the line.

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The evidence shows that defended to account the univer. The off Chicago from Fulci and grade led in 1975. Cor school distribution when she was a small chid and one or single single the sant's inglished, one of the first transfer and she met plaintiff in 1923 there has vas attending of

University; that they kept company for about five years and were married August 25, 1928, at the aunt's home. From the time defendant graduated from the University she taught in the public schools of Chicago and was thus employed when married. The couples took a short honeymoon and returned to live with defendant's aunt.

Plaintii' testified that after they returned from their honeymoon to the aunt's home the aunt seemed to be much upset and to be sorry because of the marriage; that while they lived at the aunt's home the aunt would walk up and down in the hall, so that they had little sleep at night; "she was very much worried and was very sorry that my wife ever got married, and she was very jealous of me"; that on October 13, 1928, he told his wife they had better move, but she refused, and he went to the Y. M. C. A. and lived there about three months, and during that time saw his wife occasionally; that in March, 1929, he rented an apartment and tried to get his wife to come and live with him, but she refused; that he moved from the apartment and in January, 1930, went to Springfield, where he was transferred by his employer; that he filed a bill for divorce in Springfield; that shortly thereafter, in December, 1930. his wife came to Springfield to effect a reconciliation, returning to Chicago after a day or so, and he afterward dismissed the divorce suit; that she came to Springfield again in July, 1931, and they lived there together for four days, when she returned to Chicago. Upon her return she wrote him a letter, which is in the record, the substance of which was that she was finally separating from him and suggesting that he get a divorce. It seems that her aunt was in part the cause of the trouble. Plaintiff further testified that they had not lived together since July 22, 1931, but that he had seen defendant from time to time; that "At all times up intil the bill for divorce was filed, I have been willing to make a home and

University; fast tory level or por ar aloud life, and are remembered August 25, 191, at the large action of the area of the area.

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honeyroon to the count's waste the control of the country was a second to the to be sorry because of the marrille; the the entire and the sunt's how a the sant would make up as the the out o the they had little sleep at mi ...; "er was v.r. nic. -c.r cr wit of men; that on October 13, 19 in he is a six a man of the ser there about three marties, and during the terms of the order sionally; that in targe, 19a9, as yet a mer ... oright art his wife to come and live with him, but see ran see; that he moved fro. the apartment and in Jamuery, Alm, while we is highlad, divorce in Springiled; and whereing carrester, in Deputy, 1930, his lie came to Springfield to eir or a rice chillion, pitamina to Chicago after a day or so, with the bud this the storage suit; that she caus to Springfield arein in July, in it there lived there together for four lags, when she return I to times. Upon her return and wrote wim a levter, ...to. 1 = i. v e record, t... substance of which was that she was finally secent, in from the and suggesting that he get a divorce. It seems at left with you part the cause of the trouble. Plaintiff further festified that they asd not lived together since July 72, 1951, in that which ell films qu a- 11 lia t." test ; exit of emit mort frustreles nees bill for divorce was filed. I have been willing to make a lone and provide for her if she would come and live with me. " On cross examination he testified that after he left his wife in October. 1928, he continued to see her and that they lived together as husband and wife off and on: that when they separated in October, 1928, his wife was teaching school and was endeavoring to secure a certain kind of teacher's certificate which required that she teach a year longer. He further testified that from the time they separated in 1928 he had not contributed anything toward her support except during the four days she lived with him at Apringfield: that in January, 1932, he returned to Chicago and lived in Evanston: that his wife called on him there: that in the fall of 1932 he rented an apartment in Evanston and his mother came to live with him: that he did not ask his wife specifically to come and live with him: that she visited him there several times and had dinner with him and his mother; that they went out together on their birthdays to parties and theaters; went together to the World's Fair on several occasions in 1933; that he never allowed his wife to stay with him over night while he lived in Evanston although she wanted to do so: that the wife lived on the South Side of Chicago and would call on him at Evanston and he would drive her back home in his automobile: that during March, 1934, his wife was at his house several times and spent the day and evening. "Q. And she wanted to live there. didn't she? *** And you wouldn't permit her, but you did drive her A. She wouldn't come to live with me permanently and let her aunt go and come to live with me," - that he asked her to do so on a number of occasions. "Q. When did you ask her to come and live with you from 1933 to 1934? A. Every time, from 1933 on; " that in August, 1934, his mother was away and his wife came and spent the evening with him and they lived together on that occasion; that he saw his wife in September, 1934, and told her she had better get a divorce from him; that she told him she did not

provide for her it she would one and it it it is a crust examination as t millier and witer ned it his election of a 1926, he continued to see her and that a syllyed a of or as husband and wire off and on; that when they seemed in the transfer his wife was beauting relock and has elected that be easily was a second to see that the second of the second to see the second to see the second to second the second the second to second the second to second the secon longer. He further testified that in the Land of the start 1928 he had not contributed anythin so re a burner of during the four days she lived to be the true ted and add January, 1967, he ret muer to differed or offered to the still that his wife called on did there; that is in on in a street an did not ask his wife a cuiffuch y to over a fine of a contract she visited it to the neveral birth and the built built sale set to our first out togot to thew that their tredtom sions in 1933; that he mayor elieves as a stay sitt when tos como a como a como a como a como se bavil ad elide denin revo that the wife lived on the South ii . . it is wish call on him at Eveneton of he sould drive or ... i al- accounte; that during terroh, 1964, who will do out you elevited thees didn't she? *** and you would not bear the track ow to bus *** ? see J' mbib home? A. Ohe wouldn't cor to live and de prodestly and of remission to distribute the state of the or the or the section of the order do so on a number of ocusal ma. " . . Tel , in your sy der to come and live with you from 1885 of the every this, from 1933 on: " that in Angust, 1934, tie no - er er e ment in his vire dans on the the evening wit is . . in i. It's guiney and the one occasion occasion; that he saw his tie is de le der, rea, and the her she had better get a livorer fro. in: that the rest as the rested bad want a divorce; that she wanted to start over again but would not leave her aunt; that she would not live with him in Evanston or any other place that he suggested. "Q. Did you ask her to come? A. No, I did not." He produced a letter dated February 1, 1935, from his wife in which she said that a divorce was very distasteful to her and that she still wanted to live with him, and that she had not deserted him, - "for I would be only too glad to start house-keeping again and live with you any place you say." That on February 9, ten days before the divorce suit was filed, they met with their attorneys and talked the matter over. On redirect examination he testified that during the time they were separated and until July, 1931, they lived together at different times as husband and wife, and that he was willing at all times to make a home for her and live with her, until he filed the complaint in the instant case, but she refused to leave her aunt and live with him.

Defendant testified that she was 34 years old, born and educated in Chicago, and graduated from the University of Chicago in 1923 with the degree of Bachelor of Science; that she met plaintiff before she graduated and they kept company until they were married five years later: that after they had lived with her aunt (at whose home they were married) for about two months he left, and she supposed he would have furnished a home for her, but she wanted to stay and finish her teaching so she could get her teacher's certificate, which would take at least a year more, and that plaintiff was satisfied and she continued to teach until she got the certificate in 1931; that when she left him in 1931 at Springfield, where they had lived together for four days, and returned to Chicago, she telephoned him that night and told him her aunt had been bothering her, and that he then came to Chicago where, apparently, the matter of her leaving Springfield was fully explained; that they lived together as husband and wife intermittently until August, 1934, although he would not permit her to stay overnight at his

want a diverce; that she ented to start over heals out while not leave her guit; that she fould not his. I have stan or any other proce that he can shed. ". Differ a his of the produce of the dated his of the start and that are still whate we live indicate the head not described him. - "for I would so only no guid to short longeneting again and live with you we have found to short longe after days before the diverce with any face of the product afterneys and talked was matter over. In reflect enteringing he willing a factor at direct with the less into he was willing at all that the means in the ses has he will faly, and that he was willing at all that to the condition of the sand that he was willing at all that to the condition of the graph of the condition of the graph in the condition.

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Evanston home; that the last time she lived with him as his wife was in August, 1934; that they went out together several times to dinner, theatres, and the World's Fair, and that she often visited him; that she was willing to return and live with him from 1932 on, and was still willing to do so; that her aunt seemed to be jealous of both plaintiff and defendant; that she never told him she would not live with him while her aunt was alive, but on the contrary offered to live with him in his home and would leave her aunt; that this was in 1933. Both parties gave testimony to the effect that plaintiff was somewhat impotent.

This is substantially all the material evidence in the record, and we think it falls far short of showing that defendant was
guilty of wilfully deserting plaintiff, as found in the decree. We
think the evidence shows that plaintiff's aunt was, at the beginning,
a cause of the separation, but that it was agreed between the parties
that defendant would continue to teach for another year to obtain
her certificate and live at the aunt's home during that time.

Counsel for plaintiff argues in his brief that the desertion upon which plaintiff relies occurred July 22, 1931, when defendant left him at Springfield, and that this desertion continued for more than one year, which is all the statute requires, and that there was no offer on the part of defendant to return to plaintiff within the year following July, 1931, and any offer made by her after the expiration of that year was unavailing. We have referred at considerable length to the testimony of the two parties and we think it shows that after July, 1931, and in fact since their marriage in 1928 and until August, 1934, neither of the parties thought they were permanently separated. Plaintiff testified that on numerous occasions, until 1933 and 1934, he asked her to come and live with him, and defendant testified she was willing to live with him up to and at the time of the hearing.

Evans on home; that the last time he lived which is to be shift was in august, 1934; that they went out (spector rewritt) and the fermious of the control of the control of the same was willing to the control of the c

of both plaintiff and Reference; so a reversity and plaintiff and Reference; so a reversity and like with him while her continue alive, as an even contrary offered to live with him in it is not a discount and a rest of this was in 1933. Anthough this was in 1933.

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intil 1933 and 1934, a saled of the life in its im, no fer for and the testified one was will in locally the hearths.

We think the finding of the Chancellor is against the manifest weight of the evidence, and the decree of the Circuit court of Cook county is therefore reversed and the cause remanded with directions to dismiss the bill.

REVERSED AND REMANDED WITH DIRECTIONS.

Matchett, P. J., and McSurely, J., concur.

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Materett, P. J., and Medurer, v., s ...

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation,

VS.

MARY KIRBY BAILEY, as Administratrix of the Estate of William J. Bailey, Deceased, and MARGARET GINLEY.

MARY KIREY BAILEY, as Adm'x., etc., Appellant.

MARGARET GINLEY,

Appellee.

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

287 I.A. 624⁴

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

The Mutual Life Insurance Company filed its bill of interpleader setting up that it had \$4891.41 in its possession, being the proceeds of a life insurance policy issued to William J. Bailey, and that the money was claimed by each of the two defend-Each defendant filed her answer setting up her respective ants. claim to the funds, and the cause was referred to a Master in Chancery. He took the evidence and made up his report, found that Mary Ginley had lent money to William J. Bailey in his lifetime and that Bailey had assigned the life insurance policy to her as security for the money lent; that the amount due and owing to Mary Ginley from the insured was \$5270.01; and recommended a decree be entered awarding the money to Mrs. Ginley. The court sustained some of the exceptions to the report after holding that some of the evidence introduced before the master was inadmissible. The decree found there was \$4547.50 due and owing to Mrs. Ginley for money she had lent Bailey in his lifetime and for which he assigned to her the insurance policy as security. She was awarded this amount, and the balance of the insurance money, amounting to \$391.79 was decreed to Mary K. Bailey as administratrix of the

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MARY KIRBY DAILBY, as Administratery, of the Setate of William I. walley, Deceased, and anthonous value of I. D.

MARGARET GINLEY,

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AR. JUSTICE C'OCKLOR DELIVERAL LA CONTROL EL PROPERTIE.

-1 in. to this sil out a vanguor constructal still isutuk shi pleader setting up that it had \$4491.41 in its possession, weing the proceeds of a life insurance policy issue, to billiam !. Bailey, and that his money was claimed by each of the two in Sach defendant filed in a wave er tille an her rear elive claim to the funds, and the cause w s rifers to a masser in Chancery. He took the evidance and wide up his recort, flunt time and that Bailey had assigned the life instrance only to her as security for the money lent; tog the most to the and one to Mary Ginley from the insered was \$527. . d; and recordended s decree be entered awarding the money to are. indeg. Julico villa sustained some of the exceptions to the report after some of the evidence introduced b fore the most runs installed. The decree found there was \$4547. 50 day and oring to are. while for money she had lent Bailey it his tiretime ine for vitt to assigned to her the insurance policy as secrit, . are was as and al this amount, and the balance of the instruce anney, washating to \$391.79 was decreed to Mary M. Dailey as administratrix of the estate of William J. Bailey, deceased. The administratrix, being dissatisfied, prosecutes this appeal.

The record discloses that on September 29, 1929, the Mutual Life Insurance Company of New York, issued its policy on the life of William J. Bailey for \$2500. The policy contained a double indemnity provision in case the insured died as the result of an accident. The beneficiary named in the policy was the "executors, administrators or assigns" of the insured's estate. October 29, 1929, one month after the policy was issued, Bailey, the insured, assigned the policy to Mrs. Ginley; the Insurance company was notified, and it accepted the assignment.

It being admitted that the policy was assigned to Mrs. Ginley to secure payment of the money she had lent to Bailey in his lifetime, obviously she could recover only the amount due and owing to her. This is also conceded by both parties.

But the administratrix contends that the assignment of the policy secured only the loans made prior to the date of the assignment, and that under the law such an assignment "cannot be extended to cover a loan made after the assignment has been given without obtaining a further assignment unless it was clearly the intention of the parties that the assignment should cover future loans."

The administratrix further contends that the burden was on Mrs. Ginley to prove the amount of money she had lent the insured.

Bailey. We think this is a correct statement of the law.

The master found that in assigning the policy to Mrs.

Ginley, it was the intention of the insured to secure to her repayment of money lent by her to him prior to and subsequent to the date of the execution of the assignment. And by the decree of the Chancellor there was a finding to the same effect. The Chancellor found that the exact amount advanced by Mrs. Ginley to the insured

estate of William J. Dunley, dec aser. The administration, orthogolassatisfied, prosecutes this appeal.

The record discloses that on september 78, 1977, the outlast Life Insurance Company of the York, issued its total to the thin of William J. Deiley for 3252. The policy contained a double indeanity provision in case the Lowered is the second of an accident. The heneficiary names is the policy was are "executors, administrators or assigns" of the interstips as white the form of the policy was in a set, the insured, assigned the policy to here. Cinley: one hoursed, assigned the policy to here. Cinley: one hoursed, and it accepted one assignment.

It being admitted that the policy was antiport to mre. Ginley to secure psyment or the mency and and land so thinly in his lifetime, edviously are could recover a by the mount the and owing to her. This is also concerned by solve partice.

But the administratrix contends that we second of the assi, ment, and that under the law such as assi, and that under the law such as assi, and that under the law such as assi, and the cover a loan rade after the assi, and the set ival victout

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The administratrix further contends the she urder has on try.

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Bailey. We think this is a correct state of the law lay.

The master found that in assignin, the belie to are grand dinley, it was the intention of the Insured to sector to him prayment of money lent by her to him prior to have cause and to the execution of the assignment, and by the corpe of the Chanceller there was a finding to the same office. The Chanceller found that the exact amount advanced by the totally to the inverted

before the assignment could not be determined from the evidence; that after the assignment she lent the insured other sums; that the total amount of moneys lent was \$3632, as evidenced by a promissory note dated March 25, 1932, executed by Bailey and delivered to Mrs. Ginley.

Counsel for the administratrix contend that the evidence does not sustain the findings above mentioned; that the testimony of Mrs. Ginley, which was heard by the master, was later stricken by the Chancellor because she was incompetent to testify, under the statute, the controversy being between her and the administratrix, and that the only evidence remaining in the record was the testimony of witnesses Hintzpeter and Wainwright.

Hintzpeter testified that he was an insurance agent and wrote the policy in question in September, 1929; that he did not knew Bailey, the insured, prior to the time the policy was written; that in October, 1929, Bailey told him he owed Mrs. Ginley some money and wished to guarantee that she would be repaid by assigning the policy to her; that the witness then prepared the assignment which was afterward executed by the insured and accepted by Mrs. Ginley. The witness further testified that he asked Bailey "how much he owed her. The amount I cannot recall. He did say, however, that this woman had advanced to him monies from time to time and this was the only possible way that he at that time could see toguarantee her repayment. *** He said also that he also wished to create confidence in this individual inasmuch as he considered her a source of credit."

Wainwright, called by Mrs. Ginley, testified that he was employed by the Lafayette Coal Company. (It appears that at the time in question both Bailey and Mrs. Ginley worked for that company.) The witness then identified the note executed by Bailey to Mrs. Ginley, and testified that he saw the note at the time it

before the assignment out he was a most from the ambiguity the assignment out lend une insured as a cast the total amount of moneys icut was pooles, as evanded by a promissory note dated march to, lear, shooten, by a man and livered to ars, what was a livered to ars, where to ars, where

Counsel for the administration content of the evaluate does not sustain the findings where content is what the terms of was. Civily, which was heard to seek the construction and here was here were the controllers where the controllers are nearly of the controllers are nearly of the controllers are and the feethern of the controllers are and the feetheony of witnesses and the terminal of the feetheony of witnesses and the terminal of the feetheony of witnesses and the terminal of.

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Wainwright, carled by Are. inter, testing the new nesses omployed by the hafayette road company. (if Tureare that it the time in question both Bailey and Are. winter verte there company.) The witness then identified the note as writed by unitary the it has the sat the sat the item it

was made; that he saw Bailey sign it; that at that time the witness said the note was for a considerable sum of money, to which Bailey replied, "Yes, it is, but you know yourself that at various times I have gotten money from Margaret."

Sometime after the assignment the policy was delivered to Mrs. Ginley and was retained by her. Counsel for the administration argues that it was unreasonable to believe that Mrs. Ginley would accept the assignment of the policy, which was for but \$2500, to secure the payment of monies advanced by her to the insured amounting to \$3632, as evidenced by his note, for the reason that although the policy contained a double indemnity clause, it could not reasonably be supposed that Bailey and Mrs. Ginley contemplated that he might be accidentally killed, as was the case, his death occurring July 15, 1934.

There is no contention but that the note is genuine, and there is no evidence that Bailey could secure the payment of the money he was borrowing from Mrs. Ginley in any other way than by assignment of the policy. The evidence shows that prior to the assignment she had lent him sums of money, the exact amount of which is not shown by the evidence.

Upon a careful consideration of all the evidence in the record, we are unable to say that the finding of the Master, which was sustained by the Chanceller (to the effect that the assignment was to secure the repayment to Mrs. Ginley of the money she had advanced to Bailey prior to and subsequent to the assignment) is not warranted by the evidence.

The decree of the Circuit court of Cook county is affirmed.

DECREE AFFIRMED.

Matchett, P. J. and McSurely, J., concur.

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The decree of the Official Sourt of Cook court of Filesca.

Matenett, P. J. and me areir, J., concar.

PEOPLE OF THE STATE OF ILLINOIS, ex rel., JOHN S. RUSCH,

(Petitioner) Defendant in Error,

V.

ANNA TWOHIG, RALPH D. MEFFORD and MARIE KEELEY.

(Respondents) Plaintiffs in Error.

COUNTY COURT

287 I.A. 625

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This cause is in this court upon a writ of error instituted by Anna Twohig, Ralph D. Mefford and Marie Keeley, defendants, to have reviewed the record of the County Court of Cook County, wherein they were found guilty of contempt as officers of the court, by the Honorable Edmund K. Jarecki, judge presiding, because of their misbehavior and misconduct in office as election officials while acting as judges of election and members of the Board of Registry in the 40th Precinct in the 29th Ward in the City of Chicago.

It appears from the record that on the 7th day of April, 1935, a verified petition was filed in the County Court of Cook County in the name of the People of the State of Illinois on the relation of John S. Rusch, Chief Clerk of the Board of Election Commissioners of the City of Chicago, alleging that on the 17th day of March, 1936, a registration of the electors residing in the City of Chicago was had in the 40th Precinct in the 29th Ward in the City of Chicago, for the primary election to be held on the 14th day of April, 1936, in the City of Chicago.

It was alleged that the respondents while acting as members of the Board of Registry, wilfully, fraudulently and unlawfully permitted and acquiesced in permitting names to be placed upon the two registry books furnished to them by the Board of Election Commissioners.

It was further alleged that each of the respondents wilfully, fraudulently and unlawfully permitted and acquiesced in permitting

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(Petitioner) Referred at a carrier,

(Respondents) rightiffs in trur.

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names of individuals to be placed upon the two registry books, and each of them knowingly and corruptly placed the names and history of the individuals upon the registry books without the individuals being personally present and being under oath by the respondents constituting the Board of Registry.

On April 7, 1936, an order was entered granting leave to file the petition and ordering that the defendants, and each of them, show cause, and that they appear to answer said charges.

On April 16, 1936, the respondents filed a joint verified answer in which they denied the allegations of the petition.

Thereafter upon a hearing, the defendants were each found guilty in the County Court of Cook County of misbehavior and misconduct in office as election officials, and each of them was sentenced for contempt of court for a period of six months.

This court in passing upon the question of the right of the defendants to appear in this court upon a writ of error will adhere to what we said in an opinion filed in case No. 38847. We there said:

"The Supreme Court of this state, in the cases of People v. Kotwas, 363 Ill. 336, People v. Ford, 363 Ill. 340, People v. Benjamin, 363 Ill. 344, and recently in the case of People v. Brown, 364 Ill. 273, has held that a judgment of the character of the judgment in this case, cannot be reviewed by writ of error, but that appeal is the proper procedure. The writ of error is, therefore, dismissed."

WRIT DISMISSED.

DENIS E. SULLIVAN, P.J. AND HALL, J. CONCUR.

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On April 7, 1880, an order a clare of problem leave to file the petition and ordering to the factor of acceptance of the theorem or show that they are a to reserve the surges.

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Thereafter upon a hearing, the decompositions over the round guilty in the County Court of Pook Junty of Alsonic close and wisconduct in office as election cilicate, and who contends for contends of scurt for a sale of all cortage.

This court in usersing of the court into raper in the self of erow silk the defendants to appear in this rest into a crit of the erow silk adhere to what we said in an opinion tiles in order. No. 20247. We there said:

"The Subrese Sourt of onis sithe, in the control Popple v. Ketyne, 383 III. 586, sepole v. 192, 387 III. 540, People v. Penjarit, 387 III. 149, ordered the fine the case of People v. 1999, 574 III. 149, ordered the cannot be reviewed by salt of the first situation to the reviewed by salt of error, but the proper procedure. The writ of orrunds, Share are, 21 is the proper procedure. The writ of orrunds, Share are, 21 the sales.

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DENIS X. CULTIVAR, F.J. AND DELL J. CONT.

PEOPLE OF THE STATE OF ILLINOIS ex rel. JOHN S. RUSCH.

Defendant in Error,

TS.

VIOLA R. WOJCIK and MERCEDES S. TUTTLE.

Plaintiffs in Error.

PRROF TO COUNTY COURT OF COOK COUNTY.

287 I.A. 625¹

PER CURIAM OPINION.

A petition was filed in the County court of Cook county in which it was charged that Emily Thompson, Bonnie Horton, Viola R. Wojcik, John H. Dona and Mercedes E. Tuttle, judges and clerks of election, were guilty of misconduct and misbehavior as such judges and clerks of election in the 48th precinct of the 27th ward in the city of Chicago at a primary election held in Chicago, Cook county, Illinois, on April 10, 1934, and were therefore guilty of contempt of the County court.

After a hearing Viola R. Wojcik and Mercedes E. Tuttle were found guilty as charged, and it was ordered that each of the respondents be incarcerated in the jail of Cook county for a period of one year from the date of commitment, or until sooner discharged in due course of law; these respondents have sued out a writ of error from this court and are seeking a reversal.

The Supreme court in the cases of People v. Kotwas, 363 Ill. 336, People v. Ford, 363 Ill. 340, People v. Benjamin, 363 Ill. 344, and People v. Brown, 364 Ill. 273, and this court in People ex rel. Rusch v. Kirgis et al., No. 38847, and People ex rel Rusch v. Twohig et al., No. 38930, epinions filed November 30, 1936, have held that a judgment of this character cannot be reviewed by writ of error and that appeal is the proper procedure. The writ of error is therefore dismissed.

WRIT OF ERROR DISMISSED.

PROPER OF the old of he holds ex rel. July a. Rudun. Defen ant in error.

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VIOLA R. WOJCIK and t GRC VILS S. . MITTIT Plaintiffs in arror.

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293 A.I 739

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A petition was filed in the crucic court of Cock Countr in which it was courred had Emily .ec. peon, sorois a rton, hards R. Wofoik, John d. Dona and sercedes : Puttic, ja:gre in oterns of election, were guilty of misconduct isbehavior as such Judges and clerks of clection in the 45t arconce or the 27tr ward in the city of Chicago at a principal election held in which, Cook county, llibrois, on april le, 1000, in the refore full with of conterpt of the County court.

After a hearing Viola a. Wojeix and servence . Taille were found guilty as suarged, and it was order respondents be incarrerated in the joul of work a unty or a parter term real from the date of to administration to the date and the term to the contract of the c in due course of law; take respondents have sued out a writ of error from this court and ore seeking a reversal.

The Supreme court in the case of the picting, 345 Lil. 336, People v. Ford, 363 111. 340, Pentle v. Fentanin, 565 111.344, and People v. Brown, 364 L.I. 275, at this court in People er at. Rusch v. Mirvis et al., wo. 38847, and heaple as rel busch .. Twohig et al., ko. 38930, opinions riled ove her Do. 1935, nerd ting to beneaver as to now a restation of the first a first blad of error and that appeal it in proper procedure. . To writ of error is therefore dismissel.

ICC OF PIC HOARL TO TIEV

MICHAEL J. O'MALLEY,

Appellant.

CHARLES J. O'MALLEY, (Impleaded),

Appellee.

APPEAL FROM

CIRCUIT COURT.

COOK COUNTY.

287 I.A. 625

MR. PRESIDING JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF

This is an appeal from a decree of the Circuit Court dismissing plaintiff's bill of complaint for want of equity. The facts disclosed by the bill, the answer and the evidence are as follows:

Since about the year 1907, the plaintiff, Michael J. O'Malley, has been the president and principal stockholder of the Standard Asbestos Manufacturing Company, an Illinois corporation, and, at the time of the transaction in question, was the head of a family consisting of his wife and seven children, five sons and two daughters, including the defendant, Charles J. O'Malley.

The defendant Charles J. O'Malley, was ordained a priest on June 12, 1921, and shortly after his ordination, he received an appointment as assistant pastor in Carroll, Iowa. He remained there until about September 15th of that year, when he went to Bancroft, Iowa, and served there until February, 1922. He then went to Vail, Iowa, where he was taken ill, but he remained there until November, 1923.

On November 10, 1922, Michael O'Malley, the father of the defendant, caused to be issued to his son Charles J. O'Halley, a certificate of stock for 75 shares of the Standard Asbestos Manufacturing Company, the ownership of which shares of stock is the question before us for decision.

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GIURARI J. C'ROLLAY. . \$1 _100 - 4 * X _ 11 1 1 1 1 1 1 1 1 OHAHLES J. O'Manual', (Lapis ded). . D8 . . Byc.

200 I.A. 625

This is an accord from the -- or the car is aid! dismissing plaintiff's bill of complaint for and or stairy. The facts disclosed by the lill, the ans are received by the follows:

Since about the year 1897, the a little, intend d. O'Malley, has been the president and wind or wholey, has Standard Asbeston Hanufloturing Jom one, in Milling compor Now. and, at the time of the trungentian in the wait of the conf. a family consisting of his wife and sector and dren, five some and two daughters, including the defendent, it was . tw liev.

The defend at Charles J. whealey, a some break of on June 13, 1921, and shortly ofter the ordinals, he received an appointment as seeistint obstar in rotess in treeses as ineminiogo there until about September Loth of the year, and a rat to Bancroft, lows, and served there with Debrucry, line, to them went to Voil, lows, where he was truen tan, but se go the thane until November, 1983.

On Rovember 10, 140, Michael Whally, He tipe of the defendant, coused to be resued to his sou whose , 'I alley, certificate of stock for 75 source of the time to make the Manufacturing Commany, the ownerous of mar she was seen as the cuestion, before us for decision. The son claims that this certificate was made out to him by his father as an outright gift. The father claims that the certificate was issued to his son in name only for convenience and was not intended as a gift.

After defendant left Vail, Iowa, he went to Boone, Iowa, where he remained until December, 1924. In the foregoing appointments, the defendant served as an assistant pastor. About December. 1924, the defendant was appointed as a pastor at Manning, Iowa. This was his first pastorate. He remained there until October, 1928. when he left on account of illness and came to Chicago. He remained in Chicago until early in 1929, when he went to California and he remained there until October of that year. After that time he went to live with one Father Code in Chicago, whom he assisted until Father Code died in October, 1932. After the defendant left his parish at Manning, Iowa, he no longer received any compensation from his parish nor was he earning any money. During that period he received \$200.00 a month from the Standard Asbestos Manufacturing Company which was sent to him by his father. In the spring of 1930. the defendant's father discontinued sending his son any further remittances.

Plaintiff's theory of the case is that he never parted with title to the stock and that he never intended it as a gift to his son and that no gift was made.

Defendant's theory is that the plaintiff, his father, intended to and did make him a gift of the 75 shares of stock.

Defendant contends that there was a complete gift of the shares of stock in 1922 and that the stock certificates were made out and delivered to him and that he, the defendant, had them placed in the safety deposit box of the company for safe-keeping, and that no question was raised concerning the same until some 8 or 10 years later and that during all that time the defendant had received the

The son claims to those service as ment of the by his fither and outrished ift, the forther residual to the certificate was issued to the son to the for convenience and was not intended as this.

After desendant left 100, 120, un will to 10 me, 100, where he remained until December, it is toresoin a uniter the ments, the defendant served as un la layer t motor. Court Dens Der, 1824, the defendant was appointed to test at anim, Iot. This was his first restorate, He restand there until tower, 1902, when he left on secount of illness and a set where o. to remained in Chicago until corly in 1979, when he and to different and he remained there until Cotober of the type . Aft that the ment to live with one sather vous in things, then saisted until Father Gode died in October, 198 . Ter the defeal no work his parish at Mannin, lows, as no Longer rowited any now engaging from his parish nor was all contains ny money. The parish of th received \$200.00 to enth from the thonound on to the authorities Company which were to him by his rether. In the orthogofile ... the defendent's fither discontinued sersing the sun my justiner remittanoss.

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Defendant contends the place of complete (ilt of the shares of stock in 1930 and to the distribution of the shares of stock in 1930 and to the color of the color

income from said stock.

According to the testimony of the plaintiff there had been no mention of the stock certificate from the date of its issuance until the summer of 1928, when he asked his son to return the stock.

According to the testimony of the defendant, there was no mention of the stock between November, 1923 and the fall of 1930, except on the occasion when the son took sick while at Manning, Iowa, when the plaintiff persuaded his son to resign his parish and come home to Chicago. At this time the defendant told his father that he could not resign because it was a question of his living and if he resigned, he would be without a living. Defendant testified his father said:

"I don't know what you are worrying about, you own seventy-five shares of stock, your living is assured."

On December 2, 1930, the plaintiff wrote to the defendant requesting him to return the stock and endorse the stock certificate back to him.

The evidence shows that about this time the plaintiff was having domestic difficulty with his wife, defendant's mother, and it is quite apparent that this difficulty caused the plaintiff to desire to have the stock returned to him. In the controversy between his father and his mother, the defendant championed his mother's cause.

The evidence further shows that about this time, at plaintiff's request, a conference was held in the office of Mr. Heffernan, plaintiff's attorney, and Mr. Heffernan asked the defendant if he would give back the stock; that Heffernan also stated that the question of the stock and the mother's lawsuit were going to be made one issue; that defendant refused to return the stock; that when they were leaving Heffernan's office the lawyer asked the defendant again if he would return the stock, but that defendant replied, "No". During the conference in Heffernan's office the latter said to the defendant,

income from said stock.

According to the full one of the alcincia them of the no mention of the stock centuris to run the different antil the summer of 1928, then selected the summer of 1928, then selected the summer of the selected the summer of the selected the summer of the selected th

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The evidence further shore that count this time, at ultimiting request, a conference was held in the office of m. Heffers m, while tiff's attorney, and hr. Hefferson sand the unitable of the unitable of the stock; the Hefferson also stook at the took usation of the stock and the mother's lewsuit sere joing to be a colone is ne; that defendant refused to return the stock; that then they sere is vin Hefferson's office the lawyer saked the methodous minimise would return the stock, but that defendant remised, hor. Oring the conference in deffernants office the latter and to the defendant.

"You own 75 shares of stock. Your other brothers have none."

At the hearing before the master the plaintiff testified that the certificate was made out on the date it bears in Mr. Heffernan's office in November, 1922, and was for the convenience of the Reverend Charles J. O'Malley, his son; that the defendant O'Malley was to use the income from that certificate; that defendant told plaintiff his expanses, if he got an appointment out of his diocese, would probably be two or three hundred dollars a month and that therefore the income from that certificate of stock, which was always kept in plaintiff's possession, would take care of him, the defendant; that it was the defendant who first brought up the subject of stock and that plaintiff told defendant that he would never consent to give him any stock, but would give it to him for convenience only.

Plaintiff further testified that after the ordination of his son Charles, which occurred in 1921, the defendant asked him if he wouldn't put away some stock for him, so that if he got an appointment he would be backed up; that he told defendant that he could not see his way clear at that time to do anything because it would not be fair to the other children; that he finally agreed to put some away and took defendant over to Mr. Heffernan's office on November 10, 1922; that if he got an appointment we would have to put away something for a guaranty for him; that this took place in Mr. Heffernan's office and the certificate was prepared and he, plaintiff, signed it.

With regard to the stock transfer the son, defendant herein, testified that the first talk between his father and himself transpired about a month prior to the issuance of the certificate; that his father told him he wanted to make him a stockholder in the corporation and would take steps to carry that out; that his father

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Meffernan's office in November, id , and and the constitutes of the Heverend Charles J. O'bothey, his son; the first and constituted O'bothey was to use the income from and a constitute; the cold plaintiff his expenses, if he get in receipt on both of the chart therefore the income from the descriptions of storic mands that therefore the income from the descriptions of storic saich was slawys kept in plaintiff's possession, realf the core of storic saich the desendant; that it was the defendant of that a saich subject of stock and that plaintiff told defendence in the course of the convenience only.

Plaintiff further testified that the ordination of his son Charles, which occurred in 1971, the describent ested that if he wouldn't put away some stock for him, so that if he got sa appointment he would be backed un; that e tota referrant that he would not see his way clear at that time to do anything occause it would not be fair to the other children; that are rinally reserve to put some say and took defendant over to ir. A flermin's office on November 10, 1883; that if he got an ancentarch are would have to put away something for a guer ney for him; that that took alree in put away something for a guer ney for him; that that took alree in put away something for a guer ney for him; that that took are need to and the plaintiff, signed it.

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told him that he was anxious that he ewn stock in order that he would be protected and have enough stock to insure him an income: that his father stated that he feared that the sons Edward, Johnnie, Vincent and Thomas would so regulate their salaries that there would be no profits left for distribution and to avoid this, his father wanted to make sure the control of the corporation would rest with members of the family who were not working for the company, - that is the defendant and his sisters; that the plaintiff said he would arrange a meeting with Mr. Heffernan, the attorney for the corporation, and that he would take care of the matter; that two or three weeks later plaintiff and defendant met at Mr. Heffernan's office and had a conversation in Mr. Heffernan's presence and plaintiff told the lawyer that he wanted to make a transfer of seventy-five shares of stock to defendant. The defendant further testified as follows:

"Mr. Heffernan said he thought there should be some other means of providing for my care and to protect and insure me an income. He said he did not think it wise to make clerics shockholders of the corporation.

My father told Mr. Heffernan that he had decided to do this and that he was determined to do it and he told Mr. Heffernan that he would proceed to do it. Mr. Heffernan then proceeded to draw up the certificate. He cancelled my father's certificate.

Certificate No. 15 is in Mr. Heffernan's handwriting and my father signed it at that time.

At that time, the words 'Attest: John P. O'Malley' were not on it. After my father signed it, Mr. Heffernan took it back. He told me to take it and put it in my fault, then it was left on the desk there. Mr. Heffernan said, 'When that is signed by your brother,' and he handed it to me 'You will

put it in your vault, Father. I said I would. I left the certificate there and I told my father I had no vault and he said I could put it in the

corporation vault, * * *

Mr. Heffernan was a deaf man. This was said in Mr. Heffernan's office but he did not hear it.

The next thing that occurred at that meeting was that my father proceeded to make a Will, * * *

The first time my father talked definitely about giving me the stock was, I remember, I came and told him about having insurance -, I had an operation for goiter and my heart was in bad condition and I was rejected and I was rather worried. I wanted to take an endowment policy. My father said:

told min that he wes arxious to the second to the engage protected and have enough stock to insure has an impose; at is father streed that he fevres that he some what, dorants, that and Thomas would converge to their materials, that the could be not profits left for distribution on the second to ask that the site of the fraily who were not working for the could read title of the fraily who were not working for the could read defendant and his sisters; that the substite of the could read a meeting with Mr. Hefferen, the steamy in the second read that he would take orde of the metters; the two reads reads that he would take orde of the metter; the their materials in Mr. Hefferen is a setter; the the second conversation in Mr. Hefferen is a second to the second conversation in Mr. Hefferen is a second to the mented to make a transfer of second which the second could the second conversation in Mr. Hefferen is second to second which the second conversation in Mr. Hefferen is second contents to the second conversation of the second conve

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'Don't worry about insurance, I have money to take of you. You have nothing to worry about.'
That was in the summer of my ordination in the year care of you.

Father said he was very anxious to provide me with property and stock that would assure me a living. I told him that I was more than grateful to him and we spoke.

At the time I asked, 'Was he going to transfer to me my share, that is, one-seventh of the stock?' he said 'No, that would not be sufficient to give me protection. He said, 'Well, now we will go over to Mr. Heffernan's and arrange for that. And a month later it was done. * * * At my meeting with Mr. Heffernan at his office, in 1933, he asked me if I would give the stock back, advancing as a reason that if my mother succeeded in getting her dower

rights, my father would lose control of the corporation. * *

My father first asked me to endorse the stock in a letter in December, 1930. The first time he made a real demand was at the house. That was also in December. I had no further conversation with my father in that regard. Subsequent requests were made by either Mr. Fitzgerald or John.

Mr. Heffernan said that if I returned the stock he would see ito it that my mother would receive one-third of my 75 shares and one-third of the 108 shares that my father held in his name. My brother John said he thought that if the stock was given back and the arrangement made, one-third given to my mother and one-third of my father's, that it might quiet down.

My father then, with the aid of Mr. Heffernan, drew up the outline of his will. After subtracting the number

of shares he gave me, he willed the other shares.

Mr. Heffernan asked my father for the names of the children and wrote them down on a piece of paper. Then my father said to me, 'I want one-third of those shares to go to my wife. I think it was something like 116 shares excluding the 75 shares that had been transferred to me.

When my father came into the discussion of my brother Edward, the oldest son, my father did not want to leave him anything. I said, Dad, you should not do that. Accord-ing to the state law you could disinherit him, but according to the natural law he is not deserving of it. That is, of

being disinherited.

In this outline that Mr. Heffernan was making, my name My mother was left one-third. My father was reached. thought he would leave me 26 more shares so as to make sure the control of the corporation would rest in my name. My father told Mr. Heffernan that I, being a priest and being unmarried, he thought would look after my mother and sisters in the event of his death much better than my married brothers."

The evidence in this case clearly shows that the conveyance from the father to the son was a gift fully accomplished by the transfer on the books of the company of the 75 shares of stock to plaintiff's son and from which the son received the income during the

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from the father to the son was - if fully accounts e ay the transfer on the books of the acaray of the 75 character of stack to plaintiff's son and from which the were received the wor no maring the period of approximately 10 years and, apparently in 1930, the father having domestic troubles with his wife, conceived the idea of recalling the gift of 75 shares of stock which he had made to his son. The reason for this action on his part was no doubt because the son had taken sides with the mother in the domestic controversy between defendant's father and mother.

It appears from the record that counsel for the plaintiff takes the position that the burden of proof in this suit is upon the defendant for in the trial of the case he said:

" * * * under the pleadings, the burden of proof I believe is on the defendant here so that for the present I rest."

In the bill that was filed by plaintiff, the plaintiff asked for a reconveyance of the stock and asked "that the court may decree a trust in said certificate numbered 15 resulting in favor of your orator * * * * ".

Whatever may be the position of counsel as to whether this is a resulting trust or an express trust (the latter he now maintains is the correct position) the burden of proof remains upon the plaintiff to prove the allegations by a preponderance of the evidence.

As the Supreme Court of this state said in the case of Cusack v. Cusack, 339 III. 108, at page 120:

"Where it is sought to establish a trust by parol evidence, the proof must be clear, convincing and so strong, unequivocal and unmistakable as to lead to but one conclusion, and if the evidence is doubtful or capable of reasonable explanation upon theories other than the existence of a trust it is not sufficient. (Wies v. O'Horow, 337 Ill. 267; Geraghty v. Geraghty, 335 id. 494; Neagle v. McMullen, 334 id. 168.)"

In the case of <u>Chicago Title & Trust Co.</u> v. <u>Ward</u>, 332 Ill. 126, at page 132, the court said:

"There are a number of cases in the Appellate Court holding that a transfer of stock on the books of the corporation passes the legal title. While those opinions are not authority here, that in Colton v. Williams, 65 Ill. App. 466, written by the late Mr. Justice Cartwright, is

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As the Supress Court of this store will no great of

"There are a number of one s in the sociate Don't holding that a transfer of stock on the Dooks of the corporation passes the legal title. This those orinious are not authority here, that in volton v. Allina, Ellina, App. 466, written by the late Mr. Justice Outeright, is

a clear statement of the rule. Upon the peculiar facts of that case Judge Cartwright said: 'A share of stock is defined to be the right which its owner has in the management, profits and ultimate assets of the corporation. (Cook on Stock and Stockholders, sec. 5.) The shareholder acquires the right to participate, according to the amount of his stock, in the management of the corporation, its dividends, and its assets remaining on dissolution of the corporation, after the payment of debts, The title to stock is created by registry in the books of the corporation. The certificate is not the stock itself but only evidence of the ownership of the stock. It has value only as such evidence, and apart from the shares which it represents it is worthless. It is not essential, and a registered stockholder may exercise all his privilege without it. He had power to transfer his stock, to receive dividends and to vote, and he is individually liable as a stockholder although without the usual voucher in the form (Cook on Stock and Stockholders, sec. 10: of a certificate. Beach on Private Corporations, sec. 972.) * * **

In the instant case at the time of the transfer of the stock to the defendant, the certificate remained in the lawyer's office so that the secretary of the company could put his signature on it, which he did later. The son, defendant herein, having no safety deposit box, it was suggested that the stock be put in the safe of the Standard Asbestos Manufacturing Company, which was done, and it remained there through the years during which time he received the income by way of dividends thereon.

In the argument of counsel for appellant on page 4 of their brief, in describing the meeting in the lawyer's office where the stock was transferred, it is said:

"In the conversation which took place on that occasion, it was agreed by father and son that the sole purpose for the issuance of the certificate was to invest the defendant with colorable evidence of financial responsibility to the end that the latter might obtain such ecclesiastical appointments as he might desire."

In other words, according to the theory of the plaintiffs the father and the son had engaged in a conspiracy to obtain an appointment for the defendant by misrepresentation and fraud to be perpetrated upon the church authorities and that the representations to be made by the son were, in fact, untrue. And as counsel later say:

[&]quot; * * * and that the certificate and the stock represented thereby would at all times be and remain the property of the plaintiff, "

a clear stripen of the rule. Uson the equit of to of that ones Judge Contemine sold: A sounce or stock is defined to be the right which its owner has in the new ten ment, profits and ultimate assets of the corporation. (Cook on Stock and Stockholders, sec. 5.) The snareholder sequires the right to participate, ecoording to the amount of his stook, in the management of the ocroom tion, its dividends, and its essets requiring on dissolution of the corporation, after the gment of febts. The title to stock is created by registry in the books of the corporation. The certificate is not the steek itself but only evidence of the ownership of the stock. It has value only as such evidence, and apart from the shares which it represents it is worthless. It is not essential, and a registered stockholder may exercise all his privilege without it. He had power to transfer his stock, to receive dividends and to vote, and he is individually libble as stockholder although without the usual voucher in the form of a certificate. (Gook on Stock and Stockholders, sec. 10; Beach on Private Vorporations, sac. 978.) * * **

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In the argument of counsel for appollant on mage 4 of their brief, in describing the meeting in the lawyer's office where the stock was transferred, it is said:

"In the donversation which took class on that occ sign, it was agreed by father and son that the sole arross for the issuance of the certificate was to invest the default with colorable evidence of financial responsibility to the end that the latter might obtain such ecclesistical appointments as he might desire."

In other words, according to the theory of the plaintiff the filter and the son had engaged in a conspirity to obtain an appointment for the defendant by misrepresent than and froud to on a spectated upon the church authorities and that the representations to be a deby the sen were, in fact, untrue. And as counsed later say:

* * * and that the certificate and the stock represented thoreby would at all times be and remain the property of the plaintiff.

Even if plaintiff's version of the transaction, which is not in fact sustained by the evidence, were accepted as true, he could not recover. The only purpose of the transaction according to plaintiff's statements was to deceive the church authorities by making representations to them that his son possessed and owned the stock in question and thereby induce them to appoint his son in another diocese which, otherwise, they would not have done.

Such a transaction would be fraudulent and the rule/that where two or more persons engage in a transaction to injure another, neither law nor equity will interfere to relieve either of the parties as against the other from the consequences of their own misconduct.

Flack v. Warner, 278 Ill. 368; Kirkpatrick v. Clark, 132 Ill. 342; Kaufman v. Sorrels, 164 Ill. App. 324.

We are satisfied from a review of this case, both as to the facts and the law applicable thereto, that the chancellor arrived at the correct conclusion that the plaintiff should not recover. Therefore, for the reasons herein given, the decree of the Circuit Court is affirmed.

DECREE AFFIRMED.

HEBEL AND HALL, JJ. CONCUR.

Even if plaintiff's version of the trans ction, which is not in fact sustained by the evidence, were scoopted as true, second not recover. The only surpose of the transaction scoopting to plaintiff's statements were to deceive the church authorities by making representations to them that his son cossessed and owned the stock in question and thereby induce them to appoint his son in another diocese which, ctherwise, they would not have done. Such a transaction would be fraudulent and the rule/that when the or more persons engage in a transaction to injure another, neither law nor equity will interfere to relieve either of the ortics against the other from the consequences of their own wisconduct.

Flack v. Marner, 275 III. 268; Atractitch v. Warre, IT III. 24.;

We are satisfied from a review of this o se, both as to the facts and the law applicable therete, that the obendellor arrived at the correct conclusion that the clintiff should not recover. Therefore, for the research berein given, the decree of the Circuit Court is affirmed.

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HEBEL AND HALL, JJ. CONCUR.

38618

ARDASHES BOROYAN, AVEDIS BOGHOSIAN, ARDASHES NIGOGHOSIAN, VARTAIN OURFALIAN, PARSEK KNARIAN, SOUREN DERDERIAN and STEPHEN AYVALUAN,

Appellees,

V.

MAMOOG MONSESIAN, GARABED SOGHIGIAN, GARABED KAKARIAN, VAHABED MATTESIAN, VISHON HALAJAN, PARSEGH DELAIAN, HARRY ESKIGIAN and CHURCH OF ARMENIA IN AMERICA, a corporation,

Appellants.

APPEAL FROM

COOK COUNTY.

287 I.A. 626

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of the Circuit Court of Cook County, restraining and enjoining the defendants from interfering with complainants designated in the bill as the members, officers, trustees and spiritual officials of the Armenian Apostolic Church of West Pullman, in the exercise of their spiritual or temporal duties towards the church, and from inteffering with the church meetings, and from disposing of any of the real property of the church. The decree is based upon the theory that the plaintiffs are the legally elected and qualified trustees of the Armenian Apostolic Church of West Pullman, located at 12032 South Wallace Street in the City of Chicago.

It appears that at a meeting of the members of this church held on December 17th, 1933, the defendants were elected as trustees. In the brief filed here, plaintiffs claim that the defendants unlawfully assumed to act as such trustees because the minutes of the election were never sent to the Central Executive Committee of the prelacy, as required by the constitution and rules of the church, because the election of defendants was never confirmed by the Central Executive Committee of the church body, as required by the constitution and rules, and because the Central Executive Committee terminated

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ARJASHES BOPOY AND en 12 1200 - Lue'Vu ANDAGHES MIGGOLDS. . F. P. IN Co. L. Mark. PARSEE Was alle, Jun 19 July 18 18 Mar & Charles OTEFHER AVVERANT. . noolis. Ta

ALIDE CORRECT MAINS MU. DOOMAN GARLETD KARATIET, VANA ED 1 7 .CU*. VIDEOL NALEJAN, 1 - C. : 221 5, .ekel KOKIGIAN and CHUHUN OF ELLIL I. Ankallis, a corpor tion, . drallo . A

ARL SUCTION AND DERIVE THE CLARK BUILDING

This is an amount from a degree of the circuit reprise of Gook County, restricting and enjoining the daiwn his trem interforing with complainments designated in the bill as the man cra, officers, trustees and swinttu-l office in a contract from the contract of the Church of West ullman, in the exercise of tests chirthel of tempore duties towards the church, and from interferin with the church meetings, and from discosing of any of the reserve of the course The decree is besed upon the theory that the maintiffy ore the legally elected and munifiled trusters of the marken sparolic hur of .est Pullmen. loo tel et 12032 louth all on test to the 11th of Chiongo.

It's present that a section, of the among a trin church held on December 17th, 1933, the desent ats were classed as trustees. In the brief filed here, claintiffs ilid that the dependent The ture, and appropriately the selfer of bemuses vilulusian the election were never sent to the Jeningl went ye articl of the prelacy, as recuired by the denstitution and miles of the church, because the election of decimal nts was never nor investigation of Executive Committee of the church body, and required by the annatheuti and rules, and secress the central Executive Charistan terminated the board of trustees composed of defendants and appointed plaintiffs to act as a temporary board of trustees in their stead. It is not claimed that defendants' election was not held in a legal and lawful manner, and it is not shown that any charges were formally made against them, or that they were ever given any opportunity for a hearing.

The record indicates that after the election of these defendants as trustees, Ardashes Boroyan, one of the plaintiffs, received the following letter from Mampre Calfayan, who signs it as the "Acting Prelate of the Armenian Church in America:"

"March 14, 1934.

Mr. Ardashes Boroyan, Chairman of the Provisional Board of Trustees of the Armenian Apostolic Church, West Pullman, Ill.

Dear Sir:

This Prelacy took under consideration the various charges made against the Board of Trustees in violating the Canons and Constitution of our Church, by virtue of Articles 27, 31 and 51 and other provisions of the Constitution, the Brelacy at a meeting held on January 20th, 1934, terminated the board of trustees and in their place and stead the following members of your Church have been designated to act as temporary Board of Trustees until the further order of this Prelacy.

Ardashes Boroyan
Avedis Boghosian
Ardashes Nigoghosian
Vartan Curfalian
Parsekh Knarian
Souren Derderian
Stepan Avyazian

This prelacy, in the future will notify the temporary Board to call an election of a permanent Board by the members of your church.

With fatherly blessings, I remain

Mampre Calfayan, Rt. Rev. Rev. Mampre Calfyan, Acting Prelate of the Aremnian Church in America."

It is upon the authority of this epistle that plaintiffs assume to act.

the board of trustees composed of trustees in their still at 1. It is not claimed that defendants! election is not belt in [1.] if is not manner, and it is not shown that they sere ever then any compartuality for a sering them, or that they were ever then any compartuality for a bearing.

The record indicates that the election of these defendents as trusters, indexed defendents as trusters, indexed do the following letter from Mampre delifyen, who signs it as the "Acting Prelate of the Argenian Church in sperion:

"Beroh I", 1384.

Mr. Ardaches Boreyan, Chairman of the Provisional Foard of Outers of the Armenian Apostolic Church, Seet Fullman, Ill.

Dear Sir:

This Prelacy took under consideration the various charges made against the Board of Trustees in violating the Canons and Constitution of our Charch, by virtue of Articles 27, 31 and 51 and other provisions of the Constitution, the Brelacy at a meeting belt on January 1914, 1934, terminated the board of trustees with their of oad and steed the following members of your Church was and steed to set as temporary downd of trustees until the Continuous order of this Prelacy.

Ard-ghos soroyan

-vedia Fo-hosien

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- course sorderien

This prelacy, in the future will notify the tempor by Board to call on election of a serminent board by the members of your church.

With fatherly blessings, I remain

Sampre Orlfry n.
Rt. Rev. ov. rompre diffron.
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It is upon the suthority of this elistic that alabit a saute to as

The constitution of the Armenian Holy Apostolic Church, of which the church in question is a member, was offered in evidence on the Circuit Court, by agreement of all the parties. By article 27, under the heading, "The Prelate of the Diocese", it is provided that the duties of the prelate are as follows: "To exercise supervision over the ceremonies, rites and creed of the Armenian Apostolic Church, and see that they are observed. To present proposals to such bodies that have jurisdiction, for the discharge from office of these officials and committees that act contrary to the stipulations of this constitution." Articles 28, 29 and 31, of such constitution, under the heading, "Rules for Conducting the Meetings", provide as follows:

"Article 28. The decisions given and the elections held by a Membership Meeting, are put into execution after being approved and confined by the Central Executive Committee.

"Article 29. In case the Central Executive Authorities revoke the decision of a Membership Meeting, or delay the approval of it, it is possible to appeal to the Supreme Spiritual Authorities.

"Article 31. In order to select candidates the chairman will distribute to the members present, slips of paper that have marginal notes and a seal on them. The clerk gathers these slips, counts them and reads them under the supervision of the chairman and the vice-chairman, and makes a note of the votes received by each candidate. After this, the names of the candidates are put to vote, beginning with the candidate that has received the largest number of votes in the primary voting."

Article 49 of this constitution provides that "Complaints against the church trustees should be in writing, and should be directed to the Central Executive Committee for its decision." Article 51 provides that "The Central Executive Committee has authority to dissolve the Church Trustees and to order new elections, if the trustees have disregarded the Diocesan Constitution of the Armenians in America, and when it has lost its majority through resignations and for other reasons."

We gather from the record that the controversy here results from a general schism in the Armenian church in the United States, and that the schism has produced litigation in other states of the

The deristitute i of the there is in the selection of T in the Circuit Court, by systems and is to state . By writing 27, under the her ing, "The cold to the itemes", it is move so that the duties of the real to the conlor. The said to established vision over the demenopica, rites on commit to the contract Church, and see th t they are observed in the earth are to be auti bodies that have jurisdiction, for the theer rec from office of these officials and committees the not or try to the enables of projection description (* 12 65 00 setolite ". " austriation eidt under the hering, "kulee for durinotin the artine", write to follows:

The decisions in the elections "Article 38. held by a memberaul or ting, we ut into evention from being approved and confined by the leater worthire fourithes. "Article 29. In a so the 'entr' I remain a stancition revoke the decision if a wear making he that, or helry the approval of it, it is gossible to a seri to it of the laws Spiritual uthorities. Article 31. In order to awlect conditions the obliven will distribute to the memores pre-ent, aline of memor what have narginal notes and a seri on their. The clark outland these slips, counts then and reads these under the supervision views strug, counts the vice-chrimans, and notes a note of the votes received by each annihite. It is in this, the wine and the condidates are not to vote, beginning with the condidates.

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working." Article 49 of this constitution erevies that "dompleints a ring! the church trustees should be in which , on about he direct of to the Central Executive Countitee for 1 legislar." Itial il of wilconder that the Control College of the Other that estivory dissolve the Church Prustees and to order use alections, in the trustees have disregarded the dices a Constitution of the 'r enion. in America, and when it has lost its . joilty through - of n tions and for other re sons."

We suther from the reduce that the control of more results from a general schism in the vector aburch in the Con trees, and that the schism has produced little of a party series of the Union. A similar dispute arose between Armenian church factions in the state of Pennsylvania, in which trustees, apparently elected in the same manner as the defendants here, representing the same faction as defendants, sought to restrain persons representing the faction represented by the plaintiffs in this case, from exercising their claimed rights. In <u>Lulejian et al.</u> v. <u>Hagopian et al.</u>, 317 Pa. 433, in sustaining the right of plaintiffs in that case to an injunction restraining the persons who assumed to act as trustees from acting as such, and under a situation which seems to be similar to that of the plaintiffs in this case, the Supreme Court of Pennsylvania said:

"Were plaintiffs removed from office, and if so, was the removal lawful? For present purposes, we assume that a lawfully constituted central executive committee of the Armenian Holy Apostolic Church of America had power, under the church constitution, to remove plaintiffs and to provide for the designation of their successors. The learned chancellor was unable to find from the evidence that the central executive committee, under whose action defendants claimed to exercise the right to act as members of the parish council, was the lawfully constituted central executive committee of the church, as distinguished from another central executive committee, also claiming to be the lawfully constituted committee. He found that, prior to the date when the removal of plaintiffs was said to have taken place, no notice was given to them 'that any charges had been brought against them, or that their removal was being considered by the Central Executive Committee,' and that 'no hearing was held by that committee in connection with the removal of plaintiffs.'

"At the oral argument, defendants' counsel conceded that such notice was not given and that no hearing was held, but contended that plaintiffs had deprived themselves of the right to notice by repudiating, or refusing to recognize, the authority of that central executive committee which, defendants claim, was the lawfully constituted committee. The record does not require a discussion of this argument. Defendants concede that plaintiffs were lawfully elected for the term stated, and that they had been in possession performing the duties of the parish council up to the time of the alleged removal. The burden of proof that they were lawfully removed was therefore on the defendants. ReDowell v. Wilson, 252 Pa. 91, 94, 97 A. 100. The learned chancellor said there is no evidence from which we can find * * *(that) * * * the alleged removal of plaintiffs was by a body authorized to remove. Unless it appeared that

Union. A similar dispute erose between reent nocurch factions in the state of Pennaylyrania, in which trustees, so eremaily cleared in the same cannor as the defendants dere, representing the same faction as defendants, sought to restor in account represented by the plaintifies in this asse, from specialing their claimed rights. In indicitan et al. v. Associated to their claimed rights of alight of alightifies in the tenest to the total injunction restraining the nersons show a case to a from acting as such, and under a situation which seems to be similar to that of the plaintifies in the count of the approach source of Pennsylvanie said:

"Mere plaintiffs removed from collect, of it so, wis the removal lawful? For present purposes, we assume that a longuity constituted central executive constitute of the America had constitution, to remove plaintiffs and to provide for the constitution of their successors, the interior demonstrate and designation of their successors, the interior demonstration of the remover the street of the from the evidence that the central executive constitute, under whose soften defind the absolute to everties the right to set as members of the prior to set as distinguished from another central executive of the abure, as distinguished from another central executive constitute. At also claiming to be tree invality constituted spacifies. At found that, prior to the drie shen too reserval of laintiffs was said to have taken also, no notion as siven to them. That eny chartes had been brought which there is another and that in her removal was being considered by the consister in another the order the consister in the removal of the consister of

that eny obsige and been brought wiret them, or that test removal was being considered by the tracel resultive localities, and that 'no he ring are held; by that consisted its concection with the removal organisms, definited that connect concected that such notice was not given in the trace to be ring a call, in contended that plaintiffs not defined themselves of the rist to notice by repuditing, or refurn to mostic, and active of the result of that central executive consisted, high, defendants of the record of the lawfully constituent or itter, the record of a remire a discussion of this argument, defendate concects in the remire a discussion of this argument, defendate concects that they had been in posses ion performing the set of a trace of the lapter of the time of the lapter and the council up to the time of the lapter are set of the set of council were a wifully removed a tracerage of the defendants, achowed by dilegal there are not defendants, achowed or their they were a wifully removed a tracerage of the lapter and and the carned chancellor will there is a evidence area with the weeden that "there is a verticed a time of the lapter is a selection of that they were a wifully there is an evidence area conting "that" "the body sutherized to a cove." This end that they are body sutherized to a cove. The second that they are the process of the contract of the con

this body was what it purported to be, which depended on evidence, the effect of refusing to recognize it and of disregarding its requests became immaterial. The chancellor also found that the action of the central executive committee, on which defendants rely, was a mere threat to remove on a contingency stated, and that, in fact, no removal by the committee was ordered; that the order of removal relied on was by the prelate of Armenians in America, not by the committee, and that the committee had no power to delegate its authority to the prelate.

"Having concluded that defendants had not shown that the central executive committee, under whose authority they claimed the right to act, was the lawfully constituted central executive committee, and having concluded, on evidence, that, in any event, the plaintiffs had not been removed in accordance with the church constitution, the decree was inevitable.

Nothing need be added to what was said in the learned chancellor's adjudication and in the opinion of the court in bane

disposing of the exceptions filed by defendants."

Article 51 of the Constitution of the church above quoted, limits the power of removal of trustees duly elected to the Central Executive Committee. There is nothing in the record to indicate that the Central Executive Committee ever acted in the matter, or that it delegated to Calfayan, who described himself as acting prelate, any power to remove defendants, even assuming that such committee had the right and power to do so. From anything appearing to the contrary, the only notification that defendants ever received of the attempted exercise of any such power, was by the bill filed in this case.

The decree of the Circuit Court of Cook County is reversed.

REVERSED.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

this body was what it arrorted to a, which learned an evidence, the effect of r fusing to recoming it a commentation of the constant of the commentation of the continual co

"Having concluded that desentants and next to that the central executive countities, under shock a them to they alsined the right to sor, was the invited, numerically assistable time consistes, and having constituted, or souther, or the central twe constitutes bed not now removed in adaptional with the church constitution, but now the central to the court of and to see the central distance to and the second to the central distance central disposing of the exceptions filed by defendants,"

Article 31 of the Comptitution of the range to 10 often

limits the nower of removal of trustees daily stelland to the Executive Committee. There is nothing in the rices to indicate that the Central Executive Committee ever coled in the rities, or the it delegated to Celfayen, who described hisself as noting prelate, any power to remove defendants, even essuaing that such coemittee had the right and power to do so, grow enything even that to the contrary, the only notification that daily not consequences.

The decree of the virgit that it how lowery is reverset.

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DINIB E. SULLIVAN, P.J. AND advants, J. J. Colon.

38632

JEAN S. GEARY, as Assignee,

Plaintiff and Appellee,

V.

THE GREAT ATLANTIC & PACIFIC TEA

Defendant and Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

 $287 \text{ I.A. } 626^2$

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment recovered in an action against defendant for rent. The cause was tried upon a stipulation The stipulation is, in substance, that the Foreman Bank was appointed Receiver of the premises known as 3309 West Madison Street, Chicago, Illinois, on February 26th, 1930; that on July 16th, 1931, it resigned as Receiver and Joseph B. Ford was appointed Successor Receiver and succeeded to all the rights and claim of the Foreman Bank; /the Foreman Bank, as Receiver, assigned its claim against the defendant to the plaintiff on January 27th, 1933, by an instrument in writing, and Joseph B. Ford, as Successor Receiver, by an instrument in writing, assigned his claim against the defendant to the plaintiff on January 14th, 1933, pursuant to a court order, and that the plaintiff is the actual bona fide owner of said claim against the defendant; that the defendant occupied a store at 3309 West Madison Street as tenant of the Foreman Bank, as Receiver, from the first day of May, 1930, to April 30th, 1931, under the terms of lease expiring April 30th, 1931; that on February 25th, 1931, defendant wrote the Foreman Bank enclosing unsigned original and duplicate copies of a renewal lease for one year, commencing May 1st, 1931, at a monthly rental of \$125.00, and requested the Foreman Bank to have both copies signed and returned to defendant at its earliest convenience. The letter referred to. dated February 25th, 1931, from defendant to the Foreman Bank.

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THE CREAT ATLANTIC & PACIFIC COMPANY, a CORPOTELLON,

Defendant and Appeal and

MA. JUSTICE HALL DELIVE A TOWN BRIDE OF THE STORY

This is an appeal from a full ment recovered in on usa a against defendant for rent. The news are trived upper threaten of facts. The stipulation is, in such that the entern is wester tan 5000 an man I assisted and to revises bothlooms away Street, Chicago, Illinois, on February Mith, Land; that on July 1865 Successor Acceiver and succeeded to the the rights and it in of agrinat the defendant to the clutheif on June 17 de, 200, by an instrument in writing, and Joseph w. Fort, a Successor Maceiver. by an instrument in writing, essigned his on in apravat the defendant to the plaintiff on J numry late, 1985, pursuant to a renew shir cook a state of this classiff as a set of the cook and the cook at of said claim against the def. n? nt; th t the defent nt scouring a store are and ont to immend or inside roothall task 6066 to smote a as Receiver, from the first dry of h y, 193", to north toth, 1971, under the terms of lease expiring pail 3 th, 1931; to a congroupry 25th, 1921, defendant wrote the bor min dink anclosing aucigned original and dupiloste copies of a reneral lens for one your, commencing May lat, 1931, at a monthly rent 1 of 1 c. T. and requested the Foreman Bank to have both no ine signer in intrined to defendant at its serliest convenience. The letter received to dated February 35th, 1931, from defendent to the loreman sank, Receiver, is as follows:

"Re: 3309 W. Madison Street

Herewith original and duplicate copies of renewal lease for one year commencing May 1st, 1931, at a monthly rental rate of \$125.00 with one one-year renewal privilege at \$135.00 per month.

Kindly have both copies properly signed, and return to this office at your earliest convenience.

It is further stipulated that on March 2nd, 1931, the Foreman Bank forwarded the leases to its attorney and requested him to procure the necessary court authority to execute the same; that on March 6th, 1931, the Foreman Bank, as Receiver, was authorized to execute said lease by a court order; that on March 7th, 1931, at 10:30 A.M. the Foreman Bank; having executed said leases, placed the same, properly stamped, in the U. S. Mail, addressed to the defendant. The letter offered and received in evidence by agreement is dated March 7th, 1931, from the Foreman Bank addressed to defendant, and is as follows:

"We are pleased to advise you that the Court has authorized us to execute a lease with your Company from May 1st, 1931, for a period of one year at a monthly rental of \$125.00.

We are returning herewith two leases for signature. Kindly return the original, retaining a copy for your files."

It is stipulated that on March 7th, 1931, at 1:30 P.M., defendant addressed a letter to the Foreman Bank, as Receiver, notifying plaintiff that it did not intend to renew its lease after the expiration of its then present term on April 30th, 1931, which letter was received by the Foreman Bank on March 9th, 1931; that this letter was written to the Foreman Bank by the defendant without it having any notice of the court order, or the execution of the leases by the Foreman Bank, or of the deposit of the same in the mail addressed to the defendant. Plaintiff's letter just referred to, offered and received in evidence is dated March 7th, 1931, and is as follows:

Receiver, is : s follows:

is as follows:

"Ro: 3500 W. Madison street

Nerewith original and dublicate degles of comment.
Less for one year commencing by Lat, 1985, at a worthly
rentel rate of \$185.00 with one one-year renewal originese
at \$185.00 per month.

Minily have both design ord army signed, and return to this office at your earliest souvencemen."

It is further stipulated that on teretary, 13:1, the or mail to pround formarded the lesses to its attorney and elements in this to pround the measury court suthority to execuse the ene; that on which 6th, 1931, the Foreman Bank, as eachier, so a term 7th, 1931, the Foreman Bank, having executed said lesses to the foreman Bank, having executed said lesses to the defendant properly stamped, in the U.S. Wail, addressed to the defendant.

The letter offered and received in evil and a greenent is determand 7th, 1931, from the Boreman Bank attached to iefend nt, and is as follows:

"We are pleased to advise you had an lourn has suthorized us to expose a large with your dealang from May lat, 1931, for a period of one to the monthly rented of \$185,00,

We are returning heremith two lo "a for sign ture. Rindly return the original, ret ining. "Out for four files."

It is stipulated that on warehold, 131, at 1:70 and defendant addressed a letter to the screen and, so weelver, notifying plaintiff that it did not is and to r new its lease offer the expiration of its then present term on aril 20th, 1931, which letter was received by the Foreman dank on warch Oth, 1931; that this letter was written to the screen and by the is entait situation it having any notice of the court order, or the execution of the leases by the screen sank, or of the equality the state of the sourt land of the state of the

to, offered and received in evidence is int a proh 7th, 1951, and

"Re: 3309 W. Madison Street

Our Mr. MacKenzie has been negotiating with you for the renewal for our lease on the above store. An offer of \$125.00 per month for the term of one year commencing with May 1st, 1931, and ending with April 30th, 1932, was submitted on our lease form with our letter of February 25th, 1931. To date this offer has not been accepted.

Please accept notice that we withdraw this offer and that we do not intend to renew our lease after the expiration of its present term.

Thank you for your efforts and consideration."

It is stipulated that on April 30th, 1931, defendant addressed a letter to the plaintiff enclosing keys for the premises involved, and advising plaintiff that it had vacated the same and that defendant vacated the premises prior to May 1st, 1931; that the premises were vacant from April 30th, 1931, to April 1st, 1932, and were rented for the month of April, 1932 to a third party for \$60.00 per month, and that wherever the words "Foreman Bank" are used in the stipulation, the words are intended to mean the Foreman State Trust & Savings Bank.

In addition to the stipulation, testimony was offered and received to the effect that an effort was made by plaintiff to rent the premises for the period mentioned in the stipulation.

Plaintiff's theory is that the defendant and plaintiff's assignor entered into a binding contract, wherein and whereby defendant agreed to pay a fixed rental for the premises described in the stipulation, and that the measure of damages is the amount of rent provided to be paid by the draft of the proposed lease referred to in plaintiff's letter to defendant dated February 25th, 1931, which rental is, \$125,00 a month for one year commencing May 1st, 1931. We assume that this theory is based upon the presumption that the mailing of the proposed lease prepared by defendant on February 25th, 1931, and the action of the Foreman Bank, as receiver, in procuring a court order authorizing it to execute

TRe: 2303 . Madison Street

Our Mr. Mackensie has been egotistic with for the renewal of our large in the above abore. In offer of 125.00 per month for the term of one year acmencing with My lat, 1751, and ending with faril 30th, 1893, was abmitted on our lease form with our latter of February 25th, 1851, as form the our not been accepted.

Please modept notice that as mitpores this offer and that we do not intend to rame: " and are offer the maintend to resent term.

Thank you for your efforts aim resistantion."

It is stipulated that on April Cash, Last, defendant

addressed letter to the plaintiff encapsing eye for the aremase involved, and edvising plaintiff that it has verted are are and that defendant vacated the premises prior to may let, 1931; that the premises were vacant from anti-75th, 1931, to third party for and were rented for the month of a ril, 1935 to third party for \$60.00 per month, and that wherever the cords "Forman Cent" are used in the stipulation, the words for intended to sein the Forman State Trust & Sevings Sens.

In addition to the stingentian, testingny manger nonand received to the effect that an effect of a let by lenting to rest the premises for the period ventioned in the stirulation.

Plaintiff's theory is to title defendent our drintiff's assignor entered into a binding course of, whorsing into whereby defendent agreed to pay a fired rest i for the reliase described in the stipulation, and the the sensure of dam ses is the enount of rent provided to be noid by the drift of the proposed less referred to in plaintiff's letter to referred to its february full.

1921, which rental is, \$122.00 = month for ons yell co mencing way lat, 1931. We assume that this theory is mead about the parents by presumption that the mailing of the ero osed iesse persons by

defendant on February 25th, 1931, and the action of the Forenth unk.

as receiver, in procuring a court order purporizing it to execute

the lease, and the mailing of the draft of the lease executed by the plaintiff at 10:30 A.M. on March 7th, 1931, completed a contract between the parties. There might be something in this theory if it were not for the fact that it is shown conclusively by the stipulation that, before the receipt by defendant of the lease executed by the Foreman Bank, defendant had deposited a letter in the mail to plaintiff, notifying plaintiff that he did not intend to renew this lease after the expiration of its then present term, on April 30th, 1931. It is stipulated that this letter was received by the Foreman Bank, receiver, and that the letter was written to the Foreman Bank by the defendant without plaintiff having had any notice of the court order, or of the execution of the lease by the Foreman Bank, and of the deposit of the same in the mails, by plaintiff, addressed to the defendant.

Plaintiff cites the case of <u>United States</u> v. <u>P.J. Carlin</u>

<u>Construction Co.</u>, 224 Fed. 859, as authority for his contention.

There the court said:

"Where the parties reach an agreement through correspondence, intending that the agreement shall be subsequently expressed formally in a single paper or document, which, when signed, should be the evidence of what had been agreed upon, the obligatory character of the agreement cannot ordinarily be defeated by the failure of either party to sign the formal contract. If the court can see from the writings or correspondence that the minds of the parties have met, that a proposal has been submitted by one party which has been accepted by the other, and that the terms of the contract have been in all respects definitely agreed upon, one of the parties cannot evade or escape from his obligation by refusing to sign the formal contract, which the parties understood was subsequently to be drawn and executed."

In the case at bar, however, it is evident that there had been no meeting of the minds of the parties. By the stipulation, it is established that when defendant mailed its letter by which it withdrew the proposed offer to lease the property, which it had the right

the lesse, and the mailing of the dr ft of the last erlow by the plaintiff et 10:30 A.M. on Merch 7th, 1831, completed a contrict between the parties. There might be cometaing in this theory if it were not for the fact that it is shown conclusively by the stipulation that, before the receipt by defining of the Levae executed by the Foreman Bank, defendent had decleted letter in the mail to plaintiff, notifying plaintiff that he drift not intend to renew this plaintiff, notifying plaintiff that he drift not intend to renew this lasse after the expiration of its than oresent term, on ordinated 1931. It is stipulated that this letter was received by the Foreman Bank, receiver, and that the latter was written to the foreman Bank by the defendent without plaintiff baving had any retice of the courier, or of the execution of the least by the Foreman sink, and of the deposit of the same in the walls, by the Foreman sink, and the defendant.

Plaintiff cites the case of <u>United String</u> v. U.J. Nation. <u>Construction Co.</u>, 224 Fed. 853, as sutbority for his contention.

There the court said:

dence, intending that the agreement at 11 is sabstantly expressed formally in a single paper or donger; which are signed, should be the suidence of what is a need a should be the suidence of what is a need a screed continued, the obligatory character of the agreement arenot crain-rily be defeated by the failure at aither gath to sign the formation of the maitings or acrespondence that the minds of the writings or a proposal has been submitted by one writing or accepted by the other, and that the translation of the control have been in all respects definitely a rest aton, one of the parties cannot avide or second from it obligation by a refusing to sign the formal contract, which the porties undergendaring to sign the formal contract, which the porties undersciusing to sign the formal contract, which the porties undergenently to be form and executed.

In the case at bar, however, it is evident that that the minimum no meeting of the minds of the parties. By the stipulation, it is established that when defendant mailed its letter by saion is withdre the proposed offer to lesse the property, which it had the right

to do at any time before it was notified of its acceptance by plaintiff's assignor, it had no knowledge that the Foreman Bank had signed the lease, that it had been authorized to sign the lease, or that it intended to enter into the contract.

We are of the opinion that inasmuch as there had been no completed contract between the parties, the court was in error in entering the judgment against the defendant. The judgment is, therefore, reversed.

REVERSED.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

to do at any time before it was notified of its computance by plaintiff's resignor, it had no knowledge that the soretan loak had signed the lease, that it had been achorized to sign the lease, or that it intended to enter late the contract.

We are of the octain to timerand is a care had been no completed contract between the narties, the cours with error in entering the judgment exists the december. In judgment is, therefore, reversed.

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DENIE E. SURLIVIT, P.J. AND SMEML, J. DANCE .

VASILICS DEMETROPOULOS, also known as WILLIAM DEMOS.

Appellant,

V.

MUNICIPAL COURT

PPEAL FROM

ALBERT J. HORAN; Bailiff of the Municipal Court of Chicago, and WILLIAM ONDREICKA,

OF CHICAGO.

Appellees.

287 I.A. 626

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

Plaintiff filed a petition in the Municipal Court of Chicago in and by which he makes claim to certain personal property levied upon and in the possession of Albert J. Horan, Bailiff of the Municipal Court of Chicago. In the petition it is stated that the levy was made under an execution issued out of the same court. After a trial by the court without a jury, the court found the issues for the defendant, and that the right to the property described in plaintiff's statement of claim is in the defendant. Judgment was entered on this finding, from which judgment this appeal is being prosecuted.

It is the theory of the plaintiff that he, as mortgagee under a chattel mortgage and after a default, had taken possession and was in the legal possession of the property, that the execution levied on the property by the Bailiff of the Municipal Court was not against the mortgagor, but against a third person who was not the owner of the chattels, that the judgment debtor was one of two partners in business who had executed a chattel mortgage upon the property which was foreclosed, that by various transfers, the property became vested in the last mortgagor, and that the execution could not be levied on partnership property on a judgment against one of the partners.

Defendant contends that the judgment debtor was the owner and in possession of the property when the levy was made, and that the mortgage was fraudulent,

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partners.

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Defendant contends that the judant senter as the orner and in possession of the property when the Levy and that the mortgage was fraudulent.

The record indicates that on December 23rd, 1932, George Christopoulos and George Patsoureas were partners in the restaurant business at 4352 Elston Avenue, Chicago, Illinois, and that on that date they executed and delivered a chattel mortgage upon certain chattels to William Demos, plaintiff herein, to secure the payment of 31 notes in the amount of \$3,500.00, which mortgage contained the usual covenants and provisions as to foreclosure and sale after default; that the mortgagors were in the restaurant business and remained so until April 16th, 1934, when the mortgage was foreclosed and the chattels were sold under the foreclosure; that four notices of sale were posted in the immediate neighborhood of the restaurant. one being placed on the building wherein the restaurant was located. and that two custodians were in possession of this property, one to have charge in the daytime, and the other at night, from April 11th. 1934, to April 16th, 1934, which latter date was the date of the advertised sale of the property; that on April 16th, 1934, the property was sold to Constantine A. Kotsakos for the sum of \$2,200.00. that the purchaser then received a bill of sale from the mortgagee. and that the bill of sale was properly acknowledged and recorded on the same date. The record further indicates that Kotsakos on the same date executed a bill of sale of the chattels to Spyros Poulos for the consideration of \$2,200.00, that this bill of sale was properly acknowledged and recorded on the same date, and that as a part of the purchase price of the chattels, Poulos executed a chattel mortgage on the property to Demos, the plaintiff herein, to secure the payment of 36 notes aggregating \$2,000.00; that thereafter in December, 1934, or January, 1935, the mortgagor moved the property to 4342 Elston Avenue, Chicago, Illinois, at which time there was a balance of \$1,700.00 due to the plaintiff; that Poulos then executed another chattel mortgage to plaintiff, which included not only the property

The record india tes tast on decement Christopoulos and Jeorge Essaurana mare verthern in the Cauran business at 435% daton evenue, dite to Illinia, and the on thet date they executed and arrivered a character in a carrier in chattels to William Ocnos, olrintif. | crein, to ecourt the court of 31 notes in the amount of 5,700. , tainh mort ... out insi the usual covenants and recovisions at the far elegants and a fee fiter default; that the mortgrover sers in the cost in ht linear ini remained so until April loth, 10%, sen the control of tolly and and the chattels were sold under it is considered; it is the nations of sale were posted in the lunediste med his whold if the rist umint, one being placed on the building who will the resture ht a love to the and that two oustodiens were in comments of this the crty, one to have charge in the daytime, and the other it in . t. from swill! 1934, to April 16th, 1934, which letter -t tur advertised sale of the property; the and a rid Late, it the property was sold to Constructus .. saltartsnot of blos sew ytrogorg that the purchaser then received will of the trouble wort and that the bill of gale are traceing charactered as easing and some date exactly of all the control of the life a between the same for the consideration of "6,300,000, to t 1000 bill male we have scknowledged and recorded n the telent this election the purchase wrice or the chatteln, ould so a cuter a chatteln, on the property to Demon, the did at the real, to sected to vacat of 36 notes aggregating " , on. Oh; that the other in becamber, 1934, or January, 1935, the morty pur moved the presenty at 4002 Latur Avenue, Ohicego, Illinois, ot wolch time ther we who a recoff 1,700,00 due to the plaintiff; the Louise then excent a unther obsttel mortgage to plaintiff, which included not only the troperty

mentioned in the last mentioned mortgage, but also a number of other articles of personal property, and that this mortgage was properly acknowledged and recorded on the date of its execution. further indicates that all of the unpaid notes secured by the mortgage to Demos dated April 16th, 1934, were cancelled, and that the chattel mortgage to secure the same was released. It is indicated that Poulos, the purchaser under the bill of sale dated April 16th, 1934, was in possession of the property from that date until July 15th, 1935. On July 15th, 1935, the last mentioned mortgage being in default, the mortgagee, through his agent, served on the mortgagor a notice of foreclosure, and posted one notice of a mortgagee's sale on the window of the premises where the property was located, and that three other notices were posted in the neighborhood, and that the mortgagee, through the custodian, was thereafter in possession of the property. On July 17th, 1935, the Bailiff took possession of it. Although there is no proof as to the fact of the Bailiff having taken possession of the property under an execution, it is indicated by the petition filed in the cause that the Bailiff made such levy on the property in question under an execution issued on a judgment against George Patsoureas, one of the two partners who executed the first of the chattel mortgages hereinbefore referred to. This seems to be accepted by both parties as the fact.

While several witnesses offered by defendant testified that they saw no notices of the sale of the property under the last foreclosure, as testified to by plaintiff's witnesses, none of them categorically denied that such notices were posted, and so far as it is important in the decision of this case, we will conclude that they were posted, as alleged.

William Ondreicka testified that he is the judgment creditor in the case, and that he had obtained a judgment against George

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wire or personal proparty, and that take worth or account for acknowledged and reported to the of its erroutio. The recond further indicates tell of tell or indicates secure mortgage to Demos dated tril luta, that a neclied, and about el il . tas our see pure not propos of enterior leftedo edt indicated tunt Foulos, the earch ser until in hill if ale a tel-April 18th, 1886, what in the testion of the recently there to the until July 18th, 1880, or Joly 18va, 18. , the interest mortgage being in defruit, the nort of throat it and you 3. often are Leden the . The Lorent to soliton a rogerton ent no a mortgages a sale on the window of the saise class elegages was located, and the three other notions, ere cored in the neighborhood, and that the mortgames, through the apropriety, were thereofter in bosecasion of the property. It duly aft, I - , one Bailiff took possession of it. . . ithough there is the . . if as the the fact of the Briliss having taken cosses in at the county under an execution, it is indicated by the petition false in the course to t the Bailiff mode such Levy on the property in surfich union on execution issued on a judgment of inst corne : thouses one of the two partners who executed the first of the chattel mart; the hereinbefore referred to. This seer to a counte by both artist

while seven livith ages offered by desengent tents at that they as we no notices of the all of the readers, as testified to by al intiff's attnesses, none of a categorically denied that such notices were water, and so for a issumption of this case, we will achains that the decision of this case, we will achains the tables.

William Ondreicks testified the he is the july ent credito

Patsoureas, upon the execution involved; that about April 20th, 1935, he visited the premises at $4342\frac{1}{2}$ Elston Avenue and Sound George Patsoureas on the premises, and asked him for some money on his account, and that Patsoureas was the cook in the restaurant at the time he visited it.

Defendant attacks the various chattel mortgages upon the theory that they are fraudulent and void as against a judgment oreditor of Patsoureas. The record clearly indicates that at the time the first mortgage was executed, the title to the mortgaged property was in George Christopoulos and George Patsoureas, as partners in the restaurant business at $4352\frac{1}{2}$ Elston Avenue in the City of Chicago. The judgment is against Patsoureas alone. If we should hold that the evidence shows that all the chattel mortgages were fraudulent and void, this would leave the title to the chattels included in the first mortgage, in the partners. As stated, the judgment upon which the execution issued is against but one of them.

In <u>Karchiunes</u>, v. <u>Mitsias</u>, 257 Ill. App. 95, a trial of right of property was had in the Municipal Court of Chicago, and the judgment of that court was reviewed by the Appellate Court. In that case, three partners executed three notes secured by chattel mortgage on personal property, which was recorded. The mortgage was foreclosed, and the mortgagee purchased all the property at the foreclosure sale. Thereafter, judgment by confession was obtained by a third party against two of the partners on two other notes. While the mortgage was being foreclosed, an execution on this judgment was placed in the hands of the Bailiff of the Municipal Court, who made a levy on the chattels. In holding that the bailiff could not hold the property, and that title thereto was in the mortgagee by reason of the foreclosure of the mortgaged property, this court said:

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Patsouress, upon the execution involved; that about and the promises at 4340 laston rund on Sound corresponded the promises at 4340 laston rund on Sound corresponded the last of the time he visited it.

Defendent attacks we writted on red worth on the theory that they are froudulent and void at the they are froudulent and void at the thete of the state of the st

"The two Katsiposes, as partners, each had a right or interest in the chattels subject to the mortgage. Mitsias' judgment was not against the partnership, but against the two Katsiposes individually. Their right or interest in the 'specific partnership property' was 'not subject to attachment or execution, except on a claim against the partnership.'"

Giting and quoting from Secs. 24 and 25 Cahill's Rev. Stat. 1929, entitled Partnerships.

Further the record indicates very clearly that when the levy was made on the property by the Bailiff of the Municipal Court of Chicago, the plaintiff, through his custodians, was in complete possession of it, with every indication that the possession was legal.

The custodian of the Bailiff's office who was placed in possession of this personal property after the levy, testified to the effect that at the time he and the Bailiff made the levy, he rapped on the rear door of the restaurant, and some one told him that he was not to come in; that after he had taken possession, he left the premises and when he came back, the doors were locked, and that he called the squad, - presumably policemen. We conclude from his testimony that he then took forcible possession of the property in question. The mere fact that at the time the judgment creditor visited the premises, he saw Patsoureas working there, is no indication that a fraud had been perpetrated. Plaintiff had a perfect right to employ him if he saw fit. See <u>Funk</u> v. <u>Staats</u>, 24 Ill. 632.

We find nothing in the record to indicate fraud in the transaction, and we are of the opinion that the court was in error in finding for the defendant.

For the reasons stated, the judgment is reversed and the cause is remanded with the direction that the court enter a judgment finding the title to the property in the plaintiff, and that he have possession thereof from the bailiff.

REVERSED AND REMANDED WITH DIRECTIONS.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

"The two Katsipeses, somenses, and address or interest in the charact collected to and dort, entaitsins judgment and met a inst the cartnership, at against the two Katsi over undividually. Restruct it in interest in the lapecific arthership and section attacks to attacks or evacution, except on claim entages the partnership.

diting and quoting from sees, which is the tart to the tart to the services on titled Fartnerships.

Further the record indicates very claerly and and the levens mede on the property by the milit of the menicipal Court of Chicago, the plaintiff, through his custodions, as in complete possession of it, with avery indication test the possession of it,

The evistorial property after the lavy, testified to possession of this personal property after the lavy, testified to the effect that that the time he said the claif and the lavy, destified to rapped on the rear door of the restaurant, and some and then his that he was not to come in; then effect no had reten respected, he left the premises and when he came box, the doors are locke, and that he called the squad, - premisely policies. We conclud from his testimony that he then took formione by service of the arrest of the question. The mere foot that at the time the juriment erector in question. The mere foot that at the time the juriment erector that a fraud had been empetrated. First the first right to that a fraud had been empetrated. First till find a fract right to employ him if he saw fit, see hark v. stants. It is to infic to

We find nothing in the record to indicate fruit in the term setion, and we are of the opinion that the payer was in arraw in find ing for the defendant.

For the remons stited, the judement is reversed and the cause is remanded with the direction that the pourt enter a judement finding the title to the property in the electiff, and turk he have possession thereof from the halliff.

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DENIS E. SULLIVAN, P.J. PAD HELL, J. O' DUT.

IDA E. McGRATH, Executrix of the Last Will and Testament of JOHN P. McGRATH, Deceased,

(Plaintiff) Appellee,

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ROBT. STEVENSON & CO., INC.,

(Defendant) Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

287 I.A. 6264

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant, Robt. Stevenson & Co., Inc., from a decree finding the total amount due from defendant to plaintiff upon an accounting to be \$149,287.05. The decree is based upon a bill for an accounting brought originally by John P. McGrath against the defendant Robt. Stevenson & Co., Inc., an investment banking house, formerly known as Stevenson Bros. & Perry, Inc., and later as Stevenson, Perry, Stacy & Co., and Robert L. Stevenson, Jr., and certain other individuals doing business as Kissel-Kinnicutt & Co. Service of Summons was had only on Robt. Stevenson & Co., Inc., and Robert L. Stevenson, Jr. Subsequent to the filing of the bill John P. McGrath died, and Ida E. McGrath, as executrix, was substituted as plaintiff.

The bill of complaint charges, in general, that by certain fraudulent acts and misrepresentations of Norman R. Ferguson, employed by the defendant as its agent to solicit business for the defendant in the purchase and sale of securities, the defendant wrongfully charged plaintiff's account with certain securities and wrongfully failed to account for certain other securities to which the plaintiff was entitled. Robert L. Stevenson, Jr., and the other individual defendants were charged with having subsequently assumed the liabilities of Robt. Stevenson & Co., Inc.

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Inc., from decree finding to be larged. We have a decreased plaintiff of an encounting to be larged. The learnest besed upon a bill for an encounting brown of the large fine. But a consisting browns and attended broking bough, formerly aspect and after an Stevenson, erry, at any and later and stevenson, erry, at any a consisting and overt in other individual as a consisting of the billing of the bill dobe at a consisting and a consisting of the bill dobe as executrix, and consistent and a consisting of the bill dobe as a consisting of the bill dobe as and as executrix, when substituted and an arranged as executrix, when substituted and an arranged as executrix, when substituted and arranged and attended and arranged as executrix, when substituted and arranged arranged and arranged arranged and arranged and arranged arranged arranged and arranged arranged

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The cause was referred to a Master in Chancery of the court, who took and returned into court the evidence, with his conclusions of law and fact in the form of an original report and also an additional report. To both of these reports of the master exceptions were heard. The Chancellor entered a decree in which he found the defendant, Robt. Stevenson & Co., liable to the plaintiff on all but one of the nine transactions between the litigants on which the master had held the plaintiff entitled to recover, and entered a decree adjudging and decreeing that the defendant, Robt. Stevenson & Co., Inc., pay to the plaintiff the sum we have above stated.

The findings of the court, as to the transactions upon which the decree against the defendant is based, are substantially as follows:

- "l. That on March 4, 1926, defendant sold McGrath 300 shares of Louisiana Oil Refining Company preferred stock, charging his account \$30,030.00; that thereafter its agent, Ferguson, fraudulently and surreptitiously delivered to McGrath three temporary certificates, each for 100 shares of common stock in lieu of the preferred stock; that defendant is indebted to plaintiff for this in the principal sum of \$30,030.00, with interest thereon at 5 per cent from June 6, 1928.
 - 2. That on June 27, 1926, Ferguson, as agent of defendant, represented that the common stock of American Bosshardt Furnace Corporation had a market value of approximately \$51.00 per share, and induced McGrath to give defendant an order for 200 shares of such stock, and thereafter delivered to him an interim receipt for the same; that defendant charged Mr. McGrath's account \$10,200.00 for such stock, it being, in fact, worthless at the time of purchase, which fact, however, was unknown to McGrath at the time; that defendant is indebted to plaintiff for this in the principal sum of \$10,200.00, with interest at 5 per cent from June 27, 1927.
 - 3. That on September 15, 1926, McGrath bought ten \$1,000.00 Havana Electric Railway Company 5½ per cent bonds, defendant charging his account \$9,203.06. That on or about September 23, 1926, Ferguson, as agent of defendant, fraudulently and surreptitiously delivered to McGrath, in lieu thereof, ten interim receipts for subscription warrants, each warrant entitling the helder to subscribe for 23 shares of Havana Electric Railway Company common stock; that defendant is indebted to plaintiff for this in the principal sum of \$9,203.06, with interest at 5 per cent from June 6, 1928.

The cause we referred to a Master in house y of the court, who took and returned into sourt the switches, its nie conclusions of its and fict in the intensity original report at also an additional report. To both if the rejerts of the intensity exceptions were heard. The Unancellor observe mascre to the alcinity found the defendant, "obt. itevenson. "o., itself to the alcinity on all but one of the nine trapsactions between the littints on which the master had held the plantity attitled to recover, and satered a degree adjudging and degree in that the defendant, "oot. satered a degree adjudging and degree in that the defendant, went stated.

The findings of the court, at to the transmittions unon which the degree against the defendant is head, are unbetantially as follows:

- "1. That on March 4, 1826, defendent sold to reth 300 shares of Louisians Oil seining Joseph Termice about, obsrying his account [20,040.00; that the refite its spent, Ferguson, fraudulently and surreptitionary defents the tree to McCrath three temporary sentificates, a coldent 100 names of common stock in lieu of the refilars atook; that defendant is indebted to slaintiff for this in the principal sum of \$30,030.00, with interest that our can from June 6, 1928.
- 3. That on June 37, 1976, Perguson, s, eas of defect of represented that the common stock of marian stassburit Furnace Corporation had a market vice of approximately \$51.00 per share, and included Sourath to give defend at a rorder for 200 aboves of such atcol, and the effect delivered to him an interim receive for the ane; the deserdant carry Mr. McGrath's account 10,300.00 for such stock, it being in fact, worthless of the time of purch as, intended to however, was unknown to McGrath's the time; that defend at in indebted to plaintiff for this in the "incipal sum of \$10,200.00, with interest t 5 per cent from June 37, 1937,
 - 3. That on September 15, 1836, McGreth bought en 11, 000 Havana Micotric saliway Scapany by per cent bonds, defendent charging his account \$5,803,06. That on er about epitemb r 25, 1836, Frguron, seent of term at, frauhilently on surreptitiously delivered to Joseph, in lieu thereof, ten interia receipts for subscription corrects, such contitions the holder to subscribe for all sores of Account alcotric callway Common stock; that defendent is indebted to plaintiff for this in the reincit aux of 1994, 303,06, with interest at 5 oer ount from June 6, 1994.

- 4. That on February 15, 1927, Ferguson induced McGrath to give Ferguson, as agent of defendant, an order for twenty-two \$1,000.00 SooLine 4 per cent first refunding mortgage gold bonds, due March 1, 1939; that defendant thereafter charged McGrath's account \$19,421.16 for the same; that on or about March 1, 1927, defendant, through its agent, Ferguson, fraudulently delivered to McGrath twenty-one bonds of Minneapolis and St. Louis Railroad Company, and also, on or about March 15, 1928, a twenty-second bond of Minneapolis and St. Louis Railroad Company, representing to McGrath that said bonds so delivered were genuine Soo Line bonds; that McGrath, relying upon the representations made, did not know that said bonds were not bonds of the Soo Line Railroad, but bonds which had been in default for some years, and which, at the time of delivery, had a value of approximately \$4,840.00; that defendant is indebted to plaintiff for this in the principal sum of \$19,421.16, with interest at 5 per cent from June 6, 1928.
- 5. That on or about March 5, 1927, Ferguson, as agent of defendant, induced McGrath to deliver five \$1,000.00,5 per cent Aluminum Company of America bonds, of which he was then possessed, to said Ferguson, as agent of defendant, for the purpose of delivering the same to defendant to sell for the account of McGrath. That thereafter Ferguson, as agent of defendant, represented that said bonds were being held by defendant for McGrath's account; that defendant has failed to account for the same; that for this defendant is indebted to plaintiff in the principal sum of \$5,000.00, with interest on the same at 5 per cent from October 11, 1927.
- 6. That McGrath purchased from defendant 500 shares of preferred stock of Seaboard Airline, for which defendant charged his account \$25,125.14; that Ferguson, as agent of defendant, represented that said stock was being held by defendant for McGrath's account, and as collateral security for indebtedness then due from McGrath to defendant; that defendant has failed to deliver said stock to McGrath upon demand; that for this the defendant is indebted to plaintiff in the principal sum of \$25,125,14, with interest at 5 per cent from July 26, 1927.
- 7. That on or about December 20, 1927, Ferguson, as agent of defendant, induced McGrath to give defendant an order for 50 shares of common stock of Metal Door & Trim Company; that defendant thereafter charged the account of McGrath the sum of \$2,500.00 for the same; that said Ferguson falsely and fraudulently represented to McGrath that said stock was being held 'long' by defendant for McGrath's account; that defendant has refused to account for said stock; that for this the defendant is indebted to plaintiff in the principal sum of \$2,500.00, with interest at 5 per cent from December 20, 1927.
- 8. That McGrath purchased from defendant 200 shares of common stock of American Ice Company, for which defendant charged his account \$8,506,22; that Ferguson, as agent of defendant

- A. Thet on ecru iy 19, 17, 2 1500 1130 1.7 to pive serguson, 2. ... eventy-two pl,000.00 Jounis d sets on 1,224 promised mortgage gold bonds, due o ron 1, 1833; the definition thereafter on 1700 journal, 1833; the definition of the sergular of the second bond of the sergular of the second bond of the service of the second bond of the second second second second of the second seco
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represented said stock to be held by defendant for McGrath's account as collateral security; that upon demand for the same defendant refused to deliver said stock to McGrath; that for this the defendant is indebted to plaintiff in the principal sum of \$7,295.22, with interest at 5 per cent from January 20; 1928."

No point is raised in this court as to the pleadings.

The defendant contends that the evidence is insufficient to support a finding of liability against defendant for the loss alleged to have been sustained by John P. McGrath in his lifetime.

The facts disclose that John P. McGrath, deceased, was a marchant tailor by trade; that in 1923, he began a series of transactions with the defendant, Robt. Stevenson & Co., Inc., involving the purchase and sale of securities through said defendant for his own private investment. All of his dealings with the defendant were carried on through Norman Ferguson, who was employed by the defendant at the time as a salesman, and who had originally solicited McGrath's business.

The defendant's business was principally that of underwriting and participating in the distribution and sale of new issues of securities, as distinguished from the ordinary brokerage house which deals largely in listed securities.

It appears that the defendant is not a member of any stock exchange, but it would as an accommodation for its regular investor customers, execute orders for the purchase and sale for their account of securities other than those which defendant had underwritten or in the original sale of which it was participating. These orders, however, were executed through some regular brokerage house engaged in the handling of listed securities.

Ferguson, whose actions are the subject of this controversy, was one of a dozen salesmen employed by defendant to solicit customers and secure orders for the securities waned by the defendant. While

represented and stock to be held by defendant for McGrath's account as colleter-1 security; that upon demand for the same defendant refused to deliver said stock to McGrath; that for this the defendant is indebted to plaintiff in the orinoipal sum of 77,285.28, with interest at 5 per cent from Japonery 20, 1988."

No point is raised in this court as to the ole dires.

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acting as a salesman for the defendant, Ferguson first met McGrath, and some time in 1923 induced him to become one of defendant's customers. From 1923, until the close of McGrath's account with defendant in 1928, many transactions took place and appear in that account. There is evidence that Rodney Bliss, a witness for the defendant and its sales manager, gave as his opinion that the volume of business transacted with McGrath ran in excess of \$200,000.

The defendant seeks to establish from the facts in the record that the defendant's agent, who acted for the defendant as what is called a "customer's man", at one time was engaged in a joint enterprise with John P. McGrath, since deceased, and points to the fact that Mr. McGrath in his lifetime advised George A. Heimer, defendant's cashier in charge of the Accounting Department, he no longer wanted securities delivered by defendant's messenger boys, but wanted to have all future deliveries made through Ferguson, as Ferguson was handling his financial affairs. There is in the record, however, the evidence of Rodney M. Bliss, who was formerly connected with the defendant as sales manager, and in the course of his testimony he called attention to the fact that it was the usual practice to deliver securities by defendant's messenger boys, who were bonded, or by registered mail, or to give securities to the salesman to deliver in person.

The witness Heimer, testified on cross-examination that he asked Mr. Stevenson, who was president of the defendant company, whether or not it was o.k. for Ferguson to make deliveries and that Stevenson said that it was; that in making these deliveries, Ferguson was doing what otherwise a messenger would have done and that he was doing it with full knowledge and consent of Mr. Stevenson and himself.

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The defendant contends that it is not liable to the plaintiff for the tortious acts of Ferguson while acting for both parties with their consent, in the absence of some showing that defendant participated in such acts as against the plaintiff, and this theory is based largely upon the fact that McGrath in his lifetime advised the defendant he no longer wanted securities delivered by defendant's messenger boys, but wanted to have all future deliveries of his securities made through Ferguson, and upon such advise Ferguson became the agent of McGrath.

It is well in this connection to consider the position

Ferguson occupied when employed by the defendant as a solicitor

for the purpose of selling securities which the defendant was under
writing, or in the issuance of which the defendant was participating;

and the defendant's statements in support of the position that

Ferguson was acting as the agent of McGrath in his transactions.

It appears from the testimony of Mr. Stevenson, president of the defendant company, that so far as he knew, no one else but Ferguson carried on McGrath's stock transactions, but his evidence is to the effect that this did not mean Ferguson handled everything having to do with McGrath's account.

It is quite apparent from this testimony of Stevenson's that Ferguson was in the employ and acting as the agent of the defendant and that he Stevenson had talked to McGrath over the telephone about his account being too speculative and the margin insufficient; that he must get it in proper shape and put up collateral or pay what he owed; that when Stevenson talked with Ferguson, the agent of the defendant, he was advised to get McGrath's account in proper shape, or McGrath would have to pay up what he owed; that Stevenson considered Ferguson the agent of the defendant in the matter of having the condition of McGrath's account improved.

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During the course of the several transactions involved in this litigation, Ferguson remained as an agent in the employ of the defendant, and he remained with the defendant until he disappeared. The defendant knew that MoGrath's securities were received by Ferguson to be delivered to MoGrath, and as is admitted, the defendant delivered certain securities to McGrath through Ferguson, indicating he was empowered to act for the defendant in such deliveries.

It would be rather far fetched for this court to hold, by reason of the mere fact that McGrath authorized the defendant to deliver securities and defendant permitted one of its agents to deliver them to McGrath, that Ferguson acted as the agent of McGrath.

It seems shortly after Ferguson disappeared McGrath, accompanied by his secretary, Miss MacKenzie, called at the defendant's place of business to inquare as to the whereabouts of Ferguson, and revealed that his account was not as he claimed it should be.

McGrath then made demand upon the defendant for certain specific items on which he charged a fraud had been committed, and thereafter

In order to establish the details of the account between the plaintiff and the defendent, forguson was earled as a witness on behalf of the defendant, and in calling his as a witness, the defendant veuched for his credibility, and the defendant suggests that it does not wish to be understood as relying principally for its defense upon the details of Ferguson's testimony regarding the fictitious statements and their use to keep from Fiss Wackensie, who was secretary to McGrath, and others, the knowledge that he was engaged with McGrath in speculation away from the defendant company it is also suggested by the defendant that even if Kerguson's story in all its particular details cannot be given credence, this would not mean he was not engaged in some sort of enterprise with McGrath incidental and foreign to his duties as defendant's sales agent.

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tendered securities to the defendant, along with a demand for a rescission of the contracts involving the securities, and as a result this present litigation was instituted.

The evidence indicates that Ferguson as the agent of the defendant had free access to the books, as well as use of the stenographers for dictation relative to the defendant's business with McGrath. Considerable criticism is made by the defendant regarding the acceptance of statements of account which the defendant terms as fictitious. It is a fact that Stevenson, the president of the defendant company was aware that such statements of account were at least not correct or complete, for it appears that the statements were not regular monthly statements received by McGrath, but merely memorandums of transactions of his account sent to him prior to the defendant's institution of the practice of sending out monthly statements. By defendant's own admission, the duty of Ferguson as the agent of defendant was to secure orders for the purchase of securities owned by the defendant. The defendant as an accommodation for its regular investor customers executed orders with other brokers for the purchase and sale for their account of securities other than those which the defendant had underwritten or in the sale of which it was participating. In this connection the defendant would accept payment for securities purchased, and in the purchase of such securities Ferguson would execute orders as the agent of defendant for the purchase of securities for McGrath, which purchases amounted to and were in excess of \$200,000 a year. It seems hardly plausible, nor is the statement of Ferguson credible, that the questioned transactions were for the joint account of the witness and John P. McGrath,

The story of Ferguson is to the effect that he and McGrath were engaged in a joint trading enterprise with which defendant

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result this present little tion was the fire.

The evidence indicates to t transon a t t defendant has free access to the sound, is will a us of the stemperspiners for dioceal as the second relative to the second representation of the second relative to the secon with McGratu. Consider the oriticism in a sythe 1 for at ray ing the screptones on strictments of -c cont and how as a rent a es fictitions. It is a fact to be tevened, his resident of the at least not correct or complete, for it not an interest in the were not reguler monthly streaming remised ; . o. c. V., at serily and of rely, sin to large entropy sin to environment to empharomen defendant's institution of the process of white out to neither at statements. By defendent's own " wishing a strong or organon : the spent of definition to be secure of each of definition of the secure securities owned by the defendant. The new but was a commod tip for its regular investor castomers exempled orders with other process for the purchase and a le for their rough or schurities and a turn those which the defendant had uncorverish to in the task and allowed it was perticipating, in this come that a larger with our conpayment for securifies puren sed, ad is no turen is of secon securteles targozal a demonstration of the most and the control of the the purch se of securities for tear the problem of securities to and were in excess of 100,000 tyerr. It seems nevery plantol, provide a for the state of the transactions were for the joint recount of the situes and sole ...

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was not concerned and is based upon an alleged conversation he had with McGrath at about the time McGrath commenced dealing with the defendant, in the latter part of 1923. Ferguson testified that in his conversation he told McGrath there was an opportunity for him to make money in listed and in speculative securities and in what were called new issues. He further testified he told McGrath that the defendant was not a member of any Exchange and did not care for listed business and that it was not advisable to deal exclusively with the defendant, and that he, Ferguson, was in a position to make considerable money by trading away from the defendant but that he lacked finances.

Ferguson also testified that McGrath later told him to go ahead and see what he could do in making some extra money for them aside from his ordinary investment business and that when he,

Ferguson, had something he should come back to see McGrath and he would put up the finances; that McGrath further told him that all of these transactions were to be on a fifty-fifty basis, McGrath to put up the securities to trade with and Ferguson to do the trading, they to divide the profits equally and assume the losses equally.

Ferguson further testified that he told McGrath he did not have the finances to assume the losses but that he did not expect there would be any. McGrath stated further that he did not care to have his speculative trading become known and that if he and Ferguson were to trade it was acceptable that it be done in McGrath's name. Ferguson told McGrath that he had a small account with Colvin & Co. and asked him if it was acceptable to him to trade in Ferguson's name, and McGrath stated it was.

It seems so unreasonable that MoGrath would put up his securities for the purpose of these alleged trades, and thereby suffer the loss, if any, and in the event of a profit, divide on a fifty-fifty basis. It also seems improbable from the fact that

when not concerned and is passed upon an alla, ed convers tion has atth McGrath at about the time McGrath downerced decing with the defendant, in the latter wort of 1800. Ferruson testifies that in his convergation he told Moneral that there was an opportunity for him to make money in listed and in speculative securities and in what were called new issues. He further bestiff the told points that the defendant was not a meabour of any inchange and did not care for listed business and that it was not a described and and that the defendant, and that the position to with the defendant, and that he, Northwell, who are defendant but that he lacked finances.

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securities for the purpose of these lised tries, and thereby suffer the loss, if any, and in the event of a profit, divide on a fifty-fifty basis. It also seems improvable from the cotth t

McGrath dealt in listed securities with the defendant from 1923 to 1928, and in so doing was not obliged to share his profits in such purchases, hor make arrangement with one of defendant's employees to trade elsewhere, and bear all losses and share his profits.

This story is so absurd and improbable that this court, upon the face of the evidence, believes the finding of the court was right when in effect he concluded there was no such arrangement and no joint enterprise between McGrath and this witness Ferguson.

The items here in dispute and to which the defendant points as not being sustained by the proof, are based upon facts appearing in the record, and there is some discussion as to the proof being insufficient to justify the court's finding.

It appears that in the year 1926, Ferguson, then employed by the defendant, called at McGrath's office and stated he had purchased 300 shares of Louisiana Oil Refining Corporation Preferred stock for McGrath. McGrath asked him the price and he said it was around \$100 a share, and McGrath replied, "All right."

Subsequently, McGrath received, through the mail, a confirmation from the defendant of this purchase. A charge of \$30,030, was made on the books of the defendant corporation on March 4, 1926, against McGrath, as evidenced by the defendant's ledger sheet No. 24, and defendant's statement of account dated May 22, 1926. Subsequently the defendant delivered to McGrath, through Ferguson, shares of the Common stock of the Louisiana Oil Refining Corporation without nominal or par value, instead of the 300 shares of Preferred stock which had been purchased. Ferguson admits he delivered Common stock in lieu of the Preferred stock. When these certificates were delivered Miss MacKenzie glanced at them but did not detect the fraud, and placed them in the safe where they remained until after the fraud was discovered at the time of Ferguson's disappearance in March.

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McGrath dealt in ilated accurition with the ingress front of the land in so doing has not obtained to share in realist and in so doing has not obtained to share in realist and the respondent hith one of defent at the early of trade elsewhere, and bear our losses for share his profits.

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1928. Ferguson admits these Preferred stock certificates were delivered to him by his principal for delivery to McGrath. As a result of this transaction plaintiff holds, in lieu of certificates of Preferred stock for which McGrath paid \$30,030, certificates of Common stock having a stipulated value, on March 3, 1926, of not more than \$1,400.

The decree further found that McGrath purchased 200 shares of American Bosshardt Furnace Corporation stock, which was purchased upon the recommendation of Ferguson, who told McGrath that Colvin & Co. a brokerage house, was backing this concern and that the stock was selling at \$50 a share, and Ferguson further stated that his principal, the defendant, was participating in it and that he thought the defendant could get some of this stock for him at \$50 a share. McGrath told him it would be all right, if he would watch it. after, McGrath received, through the mail, a confirmation dated June 27, 1926, of the purchase of 200 shares of this stock at \$10.200. This confirmation, according to the testimony of Dorothy Veeder, an employee of Stevenson, Perry, Stacy & Co., was dictated in the office of Stevenson, Perry, Stacy & Co. to her by Ferguson in the ordinary course of business. Miss Veeder further testified she inquired of Mr. Bliss, who was then the Sales Manager of Robt. Stevenson & Co., Inc., and under whom Ferguson worked, whether it was necessary for Mr. Ferguson to call Mr. McGrath and confirm his sales. She testified Mr. Bliss replied that McGrath had numerous transactions there and that it was not necessary for Ferguson to call him, and that she did not call McGrath for confirmation.

Ferguson testified that the confirmation, which was testified to by Miss Veeder, was made up by himself, personally.

Thereafter, according to the testimony of Miss MacKenzie, the secretary for McGrath, he, McGrath, received what is known as

1938. Ferguson muits tacas preferred stock of rails to the errodelivered to him by his principal for melivery to martin. It regult of this transportion obstitition builds, in the of nertific tea of Preferred stock for which Modrath with \$40,000, certificates of Common stock having a stimulated value, on arron 3, 130, of not more than \$1,400.

were re to the merenory, of the off it bough reduct served our of American Bossbordt furnace Corpor tion stock, which is turch ist upon the recommend than of Ferguson, and cold warrith that Jolvin louth got fout his areas and maided esw seven spractard a .00 was seliing at (50 a shore, and We ruson for are at the thit his principal, the defendint, was participating in it and the thor of the defendant could get some of this etges " .. if . if . if and the Modrath told him it would be all right, if he soil the the it. Thereafter, McGrath received, through the mail, a confinantion date June 27, 1926, of the purchase of War share of this stock at 10.300 This confirmation, recording to the testia on or orothy Recder, n employee of Otevenson, Perry, utacy & Co., we wiet ted in the office of Stevenson, Parry, .tany & Co. to her by rerguson in the ordinary Course of business. Wiss Veeder further testified she inquired of Mr. Bliss, who was then the Jales denager of obt. tevenson do., Mr. Forguson to call Mr. Moderth one confirm of a 1 or. She testi is Mr. Blice replied that kedrein had muse ous tras chors there ad that it was not necessary for Forgueon to oil dia, and it take anoldsmailage for distribut Lise ton bib

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Thereafter, according to the testimony of sisa Wooknrie, the secretary for Medrath, he, Medrath, received what is known as

a non-negotiable interim receipt for 200 shares of American Bosshardt Furnace Corporation. This purchase is also shown on defendant's statement dated October 19, 1926, it appearing as a debit in the sum of \$10,200. This statement indicates that this debit, together with the debit for the purchase of 300 shares of another security, was balanced by the sale of certain securities owned by McGrath and held "long" in the collateral account of the defendant, and thereafter disappeared from the account.

It was stipulated that this stock never had a value of \$51 per share but that at the time of the purchase of the security the stock was selling for \$20 and \$21 per share. The certificate was tendered to defendant and demand made for the return of the money paid for this security, which was refused.

As to another item, namely Havana Electric Railway Company Bonds, it appears that on August 10, 1926, MissMacKenzie was present at a conversation in McGrath's office between McGrath, Ferguson and herself, in which Ferguson stated he had laid aside ten bonds of the Havana Electric Railway Company for McGrath. McGrath said he did not know anything about this company but that if Ferguson recommended these bonds he would take them. Subsequently a confirmation of this purchase and sale was received through the mail from Stevenson, Perry, Stacy & Co. on the printed form of the defendant, reciting that they confirm for delivery through Mr. Ferguson 11,000 par value bonds at the price of \$92 for a total of \$9,203.06. This purchase was also shown on the defendant's ledger sheet, and a charge of \$9,203.06 shows on defendant's statement dated October 1, 1926, Miss Mackenzie testified that instead of delivering bonds of the Havana Electric Railway Company, the defendant, through its agent Ferguson, delivered in September, 1926, instruments which were

a non-negotiant interim receit for 30 m res of early noces, refurnace derporation. This cure at a place sour and ether the cure statement dated October 18, 1830, it as entine as remit in the cure of alloyable. This at telent indicates that this debit, together with the debit for the purchase of 10 aboves of another security, was balanced by the sale of cert in a certification which beld "long" in the collateral account of the assemble, and thereefter dispurenced from the count.

It was stipulated that this shock never had a value of above shore but that a at the time of the harman se of the security the stock was selling for (30 and bluers, the certificate was tendered to defendant and denand under far the raturn of the monapaid for this security, which was reweed.

As to emother ited, namely directle veigter June env Bonds, it appears that on August 13, 1926, its Mackenzie was present at a conversation in McGrath's office : tweet with it. Ferman and berself, in which terguson st ted as and will the other ouns of the Havena electric fellery dompony for double to kerth seid is mosure: it i that the gomes of in thoch anithtes wont ton bib recommended these bonds be would take the . subsectiontly a notifination of this purchase and sale men received through the mail from Stevenson, Lerry, Stacy & So. on the wrinted form of the defen at, reciting that they contarn for deliver; 'around . . . : rangen 1,000 purchase was also shown on the defendant's lader such, our charge of \$3,203.06 shore on defendant's attement a ter ortober 1, 1326, out to shoot gainsvilor to that to the testing bonds of the Havens wleetric deilway Courany, the dorn near', through its egent Forguson, delivered it replament, 1970, inchroments valou were subscription warrants for Common stock and which it is stipulated, were worthless. Ferguson admits that he delivered the worthless subscription warrants in lieu of bonds.

The defendant admits that the purchase of and charge for the security went through its books in John P. McGrath's account. It contends, however, in this instance, that the bonds were delivered, but to whom does not appear upon their ledger sheet, but the defendant produced a receipt for these bonds purporting to have been signed by John P. McGrath, by Anna V, MacKenzie, which Miss MacKenzie testified is a forgery. Ferguson admits that he signed this receipt and did so without Miss MacKenzie's authority. The result of this transaction was that McGrath was charged the sum of \$9,203.06 and received therefor worthless interim certificates.

A further item upon which there is a controversy is the purchase of Soo Line 4% First and Refunding Gold Mortgage Bomds. In the early part of 1927, whe was present at a conversation between McGrath and Ferguson with reference to the purchase of these bonds. Ferguson said that he was going to buy some of these Soo Line bonds for McGrath, that they would be a good investment, and that the Canadian Pacific was back of it and there would be a nice premium in it, and that he had laid aside 21 bonds of a thousand dollars each. McGrath said he thought that was a good many, but Ferguson said it was such an excellent buy and recommended that he buy them all.

McGrath consented. Thereafter, through the mail, in an envelope bearing the name of and on the printed form of the defendant, a confirmation dated February 15, 1927, confirming the sale by the defendant to McGrath of Soo Line 1st & Ref. 4% Gold bonds, "through Mr. Ferguson" was received. The charge recited in the confirmation was \$19,421.16.

subscription cerrants for Jose on a pock and which is in arthul ted, were worthless. Ferguson comits to the delivered the worthless subscription workens in lieu of words.

The defendant lains that the read so of the beauty sent through its books in John 1. Metrich! a trount.

It contends, however, in this instruce, that the books are leaivered but to whom does not appear uhon their is get abset, but the destination to whom does not appear uhon their is get abset, but the definition of the security for these bonds without his a forgery. Serguson white the signed this receipt that after the security and did so without hiss brokensies returned the result of this transaction was that work the and of the sum of the first received therefor worthings interim section these.

purchase of Soo Line 4% First and refunding would worters a strain purchase of Soo Line 4% First and refunding would worters then betteen the early part of 1927, she was greent at a country se of these condagation and Ferguson with reference to the across Soo Line condagery Medrath, that the was going to buy once of these Soo Line condager Medrath, that they would be a road investigat, rai that the faction was cook of it and there and it as a mich meremian in the said that he had isid aside all hords of a thousand dollars each.

Medrath said he thought that was good many, but arguson a lift was such an excellent buy and recommended that he buy them all.

Medrath consented. Thereafter, through the defen one, continuating the name of and on the printed form of the defen one, confirmation dasted February lo, 1377, confirming the class of so Line let a def. A sold conda, "through it. Ferousation decreased. The charge recited in the central in as specied. The class recited in the central in as seconds.

"Soo Line" bonds is the generally accepted name of bonds of the Minneapolis, St. Paul and Sault Ste. Marie Railroad Company. At the time of the purchase they had a value of approximately \$888 per thousand dollar bond, which was approximately the charge recited in the confirmation. Instead of delivering bonds of the Minneapolis, St. Paul and Sault Ste. Marie Railroad Company, otherwise known as "Soo Line" bonds, defendant through its agent, Ferguson, delivered bonds of the Minneapolis and St. Louis Railroad Company. According to Miss MacKenzie's testimony, at the time the bonds were delivered. McGrath, Ferguson and herself were present. Ferguson handed the spurious Soo Line bonds to McGrath and said, "Here are your Soo Line bonds." The witness, Miss MacKenzie, counted them and found there were 21 and that the next coupon, which was due in September, was attached. In March, 1928, the witness testified she received the twenty-second bond, and at that time Ferguson said, "Here is your other Soo Line bond." The Minneapolis and St. Louis Railroad Company bonds were in default at the time they were delivered and no interest had been paid on them for seven years,

Miss Mackenzie testified that at the time of the delivery she did not know that bonds of the Minneapolis and St. Louis Railroad Company were not Soo Line bonds; that she did not know that bonds of the Minneapolis and St. Louis Railroad Company were in default with reference to the payment of interest, and that bonds of the Minneapolis and St. Louis Railroad Company were worth only a small fraction of what Soo Line bonds were worth.

Subsequent to the receipt of the spurious bonds plaintiff received a statement in an envelope of defendant, and on its printed form. This statement shows that McGrath's account was charged \$19,421.16, for the purchase of the alleged Soo Line bonds which debit was balanced by a sale of securities then held "long" in McGrath's "long" account, consisting of Federal Land Bank bonds in

"Boo hane" ounis is the cent and the ' ' At the time or to sully and they be true out to said the \$888 per thousand doller ound, which was a routintely the and a recited in the confirmation. Instant of delivating bonds of the Minneapoits, St. Paul and but att, while filtrand Openay, otherw wise known as "Soo Line" bonds, de. north through ite cont, Ferguson, delivered bonds of the line old and to built cilract Company. According to Miss inchemnials test only, at the time tor bonds were delivered, Modrita, Vergoess and server areast. Ferguson braded the sourious Ego Line confe to air bead said, "Here are your Soo Line bonds." The minner, in the contie, counted them and found there we will no the town, to coupon, which testified she received the tenty-a sami now, it is that the Ferguson said, "Here is your other Gos fire on ." "We innercolig and St. Louis Mailroad Comeany bends were in declar at the time the were delivered and no interest had seen wid on thes for seven years

Miss MecKenzie testified that one time of the aslivery she did not know that bonds of the kinner or its and St. Louis a line to mapany were not Soo Line bonds; that abe kin met know that bonds of the Minneapolis and St. Louis Aslaws & not any were in defeult with reference to the payment of inverest, and at accuse of the inner of and St. Louis Railroad Coupany were wenth or my such or well for other of what Soo Line bonds were worth.

Subserved a statement in an envelope of defant at, and on its mintager. This statement shows that "corath's porcent was an and 19,421.16, for the purchase of the Lieged for the bonds which debit was balanced by a sale of securities term as a sale of securities and securities and securities as a sale of securities and securities as a sale of securities as a sale of securities as a sale of securities and securities as a sale of securities as a sale of securities as a sale of securities and securities as a sale of securities and securities as a sale of sec

the sum of \$15,826.35, Cities Service bonds in the sum of \$3,140, and a dividend on 300 shares of LouisianaOil Preferred in the sum of \$487.50, leaving a credit balance of \$32.74.

The ledger sheet shows that Federal Land Bank bonds were delivered "15,000 Federal Land Bank, Houston, 42%, 7/1/56, (Signed) J. P. McGrath, Anna V. MacKenzie, " which Miss MacKenzie testified was forged.

MacKenzie was also present at a conversation which took place in the year 1927 between McGrath and Ferguson, in which was discussed the matter of selling certain of McGrath's securities and reducing his debit balance with the defendant. McGrath gave Ferguson 5-\$1,000 Aluminum bonds to take over to defendant, sell, and apply the proceeds as a credit to McGrath's debit balance. Subsequent to the delivery of these bonds to the defendant, McGrath received through the mail statements of account dated March 15, 1927, and several statements thereafter. Each of these statements is on defendant's regular form and shows the Aluminum bonds being carried along in the collateral account.

Subsequently McGrath called Ferguson's attention to the fact that they had not sold the Aluminum bonds, and Ferguson said they were going "to hang on to them a little longer". McGrath said, "All right". A short time before Ferguson disappeared, McGrath said, "If you are not going to sell those Aluminum bonds, you better bring them back." Mr. Ferguson said, "All right; I think we can sell them any day on a good appreciation, but we will do as you say." The bonds were never returned to McGrath.

Another item appearing in the decree is that of 500 shares of Seaboard Air Line Preferred stock. The secretary of the late Mr. McGrath testified that he never received the stock in his lifetime. It appears however that on December 31, 1925, McGrath purchased 200

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the sum of 15,805.35, littles servine bond to the substant on 300 shares of boulsians il briterned in the substant 5487.50, leaving a credit asismue of \$487.50, leaving a credit asismue of .72.74.

rue ledger sheet shows that mederal want Jank bonds man delivered #15,000 federal Land bans, waston, 44, 7/1/56, (Signed) J. P. Modrath, Anns V. deckenzie, waited wiss extensive testified was forged.

A further item relates to the clark to bonds. The Mackenzie was also present at a convers in anish took date in the year 1937 between modrath and Ferguson, in and and discussed the matter of selling certain of modrath's accurities of relacing his debit balance with the defendant. Following a very serrousen 5-\$1,000 Aluminum bonds to take over to as anish, sell, and scaly the proceeds as a credit to dourath's debit balance. Tabsecuent to the delivery of these bands to the dear of the dear of the sellection of these bands to the dear of the selection of these statements of account interests ento is on several statements thereafter. And of these above on the defendant's regular form and shows the dumin being corried selection in the collecteral account.

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Another item some ring in the dearer is to the of SOO searer of Seaboard Air Line Preferred stock. The reactive the late use use the late of the stock in his lighting the appears however that on Jedember SI, 1979, dearer purphesed and

shares of the Preferred Stock of Seaboard Air Line, as shown by defendant's ledger sheet, and defendant's statement dated January 1, 1926, showing a debit against McGrath's account of \$10.070.08.

On March 9, 1936 additional shares of Preferred Stock of this company were purchased from defendant for \$10,053.84. This also appears upon defendant's ledger sheet and also on the statement dated May 22, 1926, showing a debit charge against McGrath's account of \$10,053.84. On March 1, 1927, McGrath received 100 shares of this security by transfer from the account of J. P. McGrath, as shown by the ledger sheet for which McGrath's account was charged \$5,001.22. According to the evidence this stock was never received by McGrath. It does appear that 500 shares of the Seaboard Air Line Preferred stock was delivered out of the defendant's office under date of July 26, 1927, but to whom delivered does not appear in the record.

Ferguson, the witness offered by the defendant, admits, however, that 200 shares of this stock, which are in dispute, were withdrawn from the defendant by him. He testified, however, that he delivered them secretly to McGrath and that McGrath later turned them over to him to deposit in their so-called joint account. It also appears that after Ferguson disappeared McGrath requested the return of this stock from the defendant and was informed that they did not have it; that it had been sold a long time ago. The decree found that plaintiff was entitled to the return of the price paid for this stock, which was \$25,124,14. In plaintiff's brief she erred in stating the court's finding to be \$10,053 plus interest. The decree entered by the court fixed the total amount due from the defendant for this item at \$25,124,14.

A further finding by the court was with regard to the Metal Door and Trim Company transaction. It appears from the evidence that on March 19, 1926, McGrath purchased 300 shares of Preferred

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shares of the Preferred Stock of earoterd hir ine, as such by defendant's ledger sheet, and defendant's atterent 1000 our y 1, 1926, showing a debit appinst behavior account of 410,070,080.

On wirch 3, 1980 additional andres of ordered thork of this company were purchased from defend of for the fort 413,753.64, fair also appears upon defendant's leager sheet and less on the at telent dated May 32, 1926, showing a debit charge appoinst wedrath's account of \$10,063.84. On March 1, 1937, Medrath precised 150 shares of this security by transfer from the coount of J. 2. No. 10,10, 25 shown by the leager abest for which were this account of a shown traceived shown by the leager the evidence this stock as never received by McGrath. It does appear the 50 shares of the case of air bline freferred stock are delivered out of the conformation of July 26, 1937, but to make delivered less out as fire the record.

Ferguson, the witness of ferrod by the referedant, semits, however, that 200 shares of this stock, which are an dispate, where withdrawn from the defendant by him. He that the construct that the delivered them secretly to wolf to the count. It them over to him to denosit in their se-called joint anount. It also appears that effect forguson disparent a hearth rought date return of this stock from the defendant of a sufficient that they did not have it; that it now here such a tong time (10. The decreational that plaintiff was entitled to the return of the order and found that plaintiff was entitled to the return of the order and for this stock, which was [45,104.14. In plaintiff, sprier she erred in stating the court's finding to be \$10,005 plus in a cat.

The decres entered by the rourt fixed the total arount due from the decres entered by the rourt fixed the total arount due from the

A further finding by the court research regers to the Motal Boor and Irim Commany transaction. It appears from the suitence

that on March 18, 1836, Medrath purchased 300 shares of Preferred

and 150 shares of Common stock of this company for \$16,840.84. This stock was delivered on August 18, 1926, and the ledger shows that on October 15, 1926, these 300 shares of Preferred and 150 shares of Common stock were received by defendant and subsequently, on April 26, 1928, sold for \$16,796.84 and McGrath credited therefor. As to these items there is no complaint by the plaintiff. However, on January 1, 1928, the statement of this date shows a purchase of 50 shares of Metal Door and Trim Company stock for \$2,500 and a debit against McGrath's account for this amount. The evidence indicates that Ferguson advised McGrath to make this purchase, but that McGrath never received the 50 shares. This stock is shown "long" on statement dated January 1, 1928, and on statement of March 1, 1928. was made for the return of this stock after Ferguson's disappearance but McGrath was informed that defendant did not have and never had had this stock. As a result of this transaction, McGrath was defrauded of the purchase price of the stock, which was \$2,500.

As to the item of American Ice Company, it appears from the finding of the decree that McGrath purchased 200 shares of the common stock on April 7, 1927, for \$26,006.22, which appears as a debit against McGrath on defendant's statement of May 1, 1927, and the purchase of this stock shows on defendant's ledger sheet. The plaintiff admits that there is no question of the purchase of 200 shares of this security, after which the stock was split four for one and the 800 shares resulting from this split were shown on all ledger sheets and statements received by McGrath from the defendant up to and including December 1, 1927. The ledger sheet shows delivery of 300 shares of American Ice Company on December 27, 1927, for \$9,000. The account is credited with \$9,000, and the 200 shares were released.

No complaint is made by the plaintiff as to 600 shares of the 800 split shares. However, the ledger sheet shows delivery of

and 150 shares of Common stock o this come my for 11,847.84. The stook was delivered or August le, idea, and the ledger shows to a on October 15, 1986, these 30° abares of heferrod or 15° shores of Common stook were received by defendent ind subsectionity, on infil we 1928, sold for \$16,796.84 and Mouth the aredited therefor. As to these items there is no complaint by the disintiff. Heaven, on January 1, 1928, the statement of this fate above a currenge of ED shires of Metal Ocor and Frim Jam any stuck for 3,000 and theit The svidence indicates .inmose sidt rol inmoses atdierbos teniege that Ferguson advised Modreth to onke this over a , out to t igur th never received the 50 shores. This whose as shown "long" on statement dated January 1, 1928, and on at the or therea 1, 1988. Demon enderna main singapara, vodi doots sint to nuuter and rol show ser Lind reven bur eved don 'i' in in het det bemoont a'w dierwoll tud had this stook. As a result of this tr nathion, he write wis defrauded of the purchase price of the atop, sieh as 1,500.

As to the item of American Ine Jeanny, it and are from the finding of the deoree that Modrath which where a first or the columnstock on April 7, 1927, for (28,006.33, which we rake a first against Modrath on defendant's streems of thy 1, 12 %, and the purchase of this stock shows on defendant's lefter sheet. The laint admits that there is no question of the area of the and the formality, after which the stock was arith four for our and the forest shares resulting from this sulfit from the infinite shares resulting from this sulfit from the leften of the unit to an including statements received by Accord from the leften of the to an including December 1, 1927. The ledger sheet cases deliver of above of the count is credited with 19,000, and the 600 shares mere relatered.

No complete is made by '..e of intif' as to (0.) shares of the 200 split shares. However, the ledger short snows lativery of

the remaining 200 shares of this stock on January 20, 1928. The defendant offered a receipt for these 200 shares, signed "John P. McGrath." From the evidence, this receipt is a forgery, and the further fact is McGrath never received this stock.

Ferguson by his evidence admits he signed McGrath's name to the receipt for 200 shares which were withdrawn from the defendant. From his evidence he claims he had McGrath's authority to withdraw the stock, and that the stock was deposited by him in the so-called joint account with McGrath's knowledge and consent. The amount found due on this item was \$7,295.22, plus interest.

The court further found as a result of the accounting that the total amount due from the defendant to the plaintiff is \$149,287.05, including interest, as follows:

| 2/15/27 To Minneapolis, St. Paul and Saulte St Marie Railroad Bonds | *19,421.16 |
|---|------------|
| To interest on same at 5% 6/6/28 to 7/11/35 | 6,892.86 |
| 3/9/26 To Havana Electric Railway Bonds | 9,203.06 |
| To interest on same at 5% from 8/6/28 to 7/11/35 | 3,265.78 |
| 12/20/27 To Metal Door and Trim Company stock | 2,500.00 |
| To interest on same at 5% from 12/20/27 to 7/11/35 | 944.79 |
| 3/4/26 To Louisiana Oil Refining Corp. stock | 30,030.00 |
| To interest on same at 5% from 6/6/28 to 7/11/35 | 10,647.42 |
| 6/27/26 To 200 shares American Bosshardt Funnace Corporation To interest on same at 5%, | 10,200.00 |
| from 6/27/27 to 7/11/35 | 4,099.83 |
| 10/11/27 To 5 bonds, Aluminum Co. of America To interest on same at 5% | 5,000.00 |
| from 10/11/27 to 7/11/35 | 1,937.50 |
| 4/7/27 To 200 shares American Ice Co. | |
| less amounts received from same To interest on same at5% | 7,295.22 |
| from 1/20/28 to 7/11/35 | 2,736.60 |

the remaining 200 shares of this stock on January 1, 1368. The defendant offered a receipt for these 200 spaces, signed "John sa McGrath." From the evidence, this should is a party, and the further fact is McGrath never received this stock.

Ferguson by distributed well at all as an tale of the manto the receipt for 200 saures which were attained from the derendent From his evidence he called he called and attained to eithim the stock, and that the stock was demanted by an in the so-cated joint account with MaGrath's knowledge and outsent. The amount found due on this item was 7,395.22, along interest.

The court further found as a magnit of the electrotime that the total amount due from the defendant to the obvictiff is \$149,287.05, including interest, a failure:

| 2/15/27 | To Einneapoiis, Ct. Paul and Fulte Lv., Marie Pallrond donds To interest on same et 5) | of the fet |
|----------|---|-------------------|
| | @/6/28 to 7/11/35 | 60.38. <u>,</u> 2 |
| 3/3/36 | lo ilevene disctric Til y Pende To interest on seme et Sp | €, 1, |
| | from 6/6/33 to 7/11/35 | 27.0.0. |
| 12/20/27 | To interest on same at on | 00. , , |
| | group 13/30/27 to 711/35 | E. C. L. L. |
| 3/4/36 | To Louisine (il nefining tore, stock To interest on same at the from 6/6/38 to 7/11/36 | 00 47.7 |
| | from 6/6/28 to 7/11/36 | 12,12, I |
| 6/27/26 | To 200 aboves therisen Bossoordt Namoe Corportion To interest on the et 5%, from S/27/57 to 7/11/65 | or of the |
| | 20/11/2 of 2/12/2 mort | 38.56 |
| 12/11/61 | To b bonds, Alucinum do. of serie | 00. 10 t= |
| | To interest on the state from 10/11/87 to 7/11/55 | 50.80 .1 |
| 4/7/37 | To 200 shares American loc Co. less amounts received from a me To interest on same till | · .088. 7 |

Co. 998.5

from 1/30/28 to 7/11/35

| 13/31/25 | To 200 shares Preferred stock of Seaboard Air Line To interest on same at 5% from 7/26/27 to 7/11/35 | \$ 10,070.08 |
|----------|---|--------------|
| | from 7/26/27 to 7/11/35 | 4,007.03 |
| 3/9/26 | To 200 shares Preferred stock of Seaboard Air Line | 10,053.84 |
| , | To interest on same at 5% from 7/26/27 to 7/11/35 | 4,000.59 |
| 3/1/27 | To 100 shares Preferred stock of | 5 001 22 |
| | Seaboard Air Line To interest on same at 5% | 5,001.22 |
| | To interest on same at 5% from 7/26/27 to 7/11/35 | 1,990.08 |
| | Total - | \$149,287.05 |

From an examination of the facts, there is evidence to support the various findings by the court included in the decree. The defendant contends, however, as heretofore stated in this opinion, that the evidence is insufficient to support a finding of liability against the defendant. We are unable to agree with this contention, as we believe from the facts and the manifest weight of the evidence the court was justified in entering the decree finding as it did.

It is apparent from the whole record that the witness

Ferguson, who was employed by the defendant and not by McGrath in
his lifetime, was guilty of conversion and of having acted for and
on behalf of the defendant in this case, and the defendant as
principal is liable. One of the cases cited by the plaintiff is

Edwards v. Dooley, 120 N. Y. 540, and the defendant has adopted
oertain language therein contained as being helpful in the decision
of this case, which is as follows:

"While a principal is bound by his agent's acts when he justifies a party dealing with his agent in believing that he has given to the agent authority to do those acts, he is responsible only for that appearance of authority which is caused by himself, and not for that appearance of conformity to the authority which is caused only by the agent. * *

For the appearance of authority he is responsible only so far as he has caused that appearance. For the appearance of the act the agent alone is responsible. The fundamental proposition is that one man can be bound only by

| 90.777.4 | To 20 shares Preferred Stuck of Seabourd Air Line To interest on same of bitrom 7/26/27 to 7/11/75 | 12/31/35 |
|-------------|--|----------|
| .48 | To 200 shares Preferred stock of Jestopard lir line To interest on sine at the from 7/26/37 to 7/11/55 | 3/9/28 |
| 1,980,08 | To 17 sh res trest ed shot of Serboard Air Line To interest on state t 55 from 7/36/87 to 7/11/35 | 3/1/37 |
| 0143, 87.05 | - fetor | |

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From an examination of the frote, there is evidence to support the v rious findings by the court i cauded in the degree.

The defendent contends, however, as meretofore shoted in this coinion that the evidence is insufficient to support a finding of liability against the defendant. We are unable to spread that the defendant we are unable to spread that and the evidence as we believe from the frots and the menifout reight of the evidence the court was justified in entering the degree of the sit die.

It is apparent from the whole record that the situess Ferguson, who was employed by the defendant and out by educate in his lifetime, was guilty of conversion and of having sted for and on behalf of the defendant in this case, and the let name as principal is liable. One of the cases oil to the unitial tendence of the cases oil to the unitial tendence of the defendant of the series and the defendant of the series therein contained as sain; let ful in the decision of this case, which is as follows:

"Mile a principal is bound by als ent; des aben he justifies a serty dealing with is a entity leading that he has given to the eject sutherity to in the estaphe to recommend only for the appearance of utacity which is caused by himself, and not for the entry conformity to the sutherity which is caused only by the agent. " "

For the ampear not of authority he is r = raible city of r :s be his orused that splass not. For the earth ance of the ct the agent alone is responsible. The fundamental proposition is that one wan on he bound only by

the authorized acts of another. He cannot be charged because another holds a commission from him and falsely asserts that his acts are within it."

We quite agree with the reasoning of the New York court that the principal cannot be bound by the acts of the agent where the agent creates the appearance of authority. However, in this case it is clear from the record that Ferguson, in carrying out the acts indicated in this opinion, did so as the agent of the defendant without himself creating the appearance of such authority, but at the direction of the defendant.

We believe that the court was fully justified in entering the decree, and it is our duty from the conclusion we have reached to affirm the decree. Accordingly the decree is affirmed.

DECREE AFFIRMED.

DENIS E. SULLIVAN, P.J. AND HALL, J. CONCUR.

the authorized acts of whother. He cannot be sharped because another holds a commission from him and salesing that that his acts are within it."

require agreen with the responded of the destroy that the principal cannot be bound by the destrant of the agent creates the appearance of retherist. However, in that case it is clear from the record that Perguson, in carrying but the acts indicated in this opinion, die also be the theorem of the catering the eptersone of such outhority, but at the direction of the defendant.

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JEWAN AND JUNEAU.

DANIS B. SULLIVAR, P.J. AND HALLS, J. COLUBBA.

38702

NICHOLAS TATE for the use of Regal Radio Manufacturing Company, Inc., a corporation,

APPEAL FROM

(Plaintiff) Appellant,

MUNICIPAL COURT

V

DANIEL BURKHARTSMEIER COOPERAGE COMPANY, a corporation,

OF CHICAGO.

(Defendant) Appellee.

287 I.A. 627

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from a judgment entered for the defendant in a suit instituted in the Municipal Court of Chicago upon an assignment of wages brought in the name of Nicholas Tate, the assignor, for the use of Regal Radio Manufacturing Company, Inc., a corporation, the assignee, against Daniel Burkhartsmeier Cooperage Company, a corporation, Tate's employer.

A trial was had before the court, and at the close of plaintiff's case the defendant made a motion to find the issues for the defendant, which motion was sustained, and thereupon judgment was antered on the finding against the plaintiff.

From the facts as we have them before us, it appears that on the 24th day of November, 1934, the Regal Radio Manufacturing Company, the plaintiff, was actively engaged in business in the City of Chicago, and that on the 24th day of November, 1934, Nicholas Tate, the nominal plaintiff and assignor herein, and Leona Tate, his wife, executed and delivered to the plaintiff their certain judgment note and that as security for the payment of said note, on the same day, November 24, 1934, Nicholas Tate, executed and delivered to the plaintiff an assignment of wages, and at the time of the delivery of the assignment of wages by Nicholas Tate there were certain blanks in the printed form of assignment which had not been filled in at the time Nicholas Tate signed the document, but the blanks were

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Monufacturing Company, Inc., a corporation, }

(Pleintiff) Accessors

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(Defendent) Appenden.

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AR. JUSTICE TALLE SILVED OF THE COLLEGE.

Inia is an appeal by the mistal from gul ment onto and for the defendant in a guit instituted in the unital all Court of Oniongo upon an assignment of a ges prought in the last and standard for the use of legal action and obusing Court line, a corporation, the assignes, against a an action the assignes, against an at a writer than the Cooperage Courty and corporation. Take a search and a corporation. Take a search and a corporation.

A triple we had before the mart, where he close of plaintiff's case the defendant made a cotion to find the issued for the defendant, which motion was sant indep. ... therewon judgmen was entered on the finding that the outline fire of the outline.

From the frots on we have then before as, it is nears that on the 24th day of November, 1934, the Loral with infraturing Company, the plaintiff, we notively enter in a since in the city of Chicago, and that on the 3 th day of the infant, 1934, icholes the nominal plaintiff and as denot freit, and a son. Inte, har its executed and delivered to the plaintiff that as security for the payment of and note, on the case of and that as security for the payment of a full note, on the case plaintiff an assignment of a ges, and at the time of the plaintiff an assignment of a ges, and at the time of the plaintiff and assignment of a ges, and at the time of the lattery of the assignment of assignment which but the latter are the blanks in the printed form of assignment which but her find that as a signed the focusent, but the finds and

subsequently filled in on a typewriter under the supervision and direction of the president of the plaintiff company on the same day that Nicholas Tate delivered the assignment of wages to the plaintiff, but after Nicholas Tate left the plaintiff's office.

It further appears that Nicholas Tate was in the employ of the defendant company on the 34th day of November, 1934, and that he remained continuously in the employ of the defendant up to and including the 17th day of June, 1935; that on the 34th day of April, 1935, a notice of assignment was served on the defendant company relative to the wages of Nicholas Tate, and that from the 24th day of April, 1935, to the 17th day of June, 1935, Nicholas Tate, the assignor, earned while in the employ of the defendant company the sum of \$110.

The important question involved in this case is whether the alteration of the contract signed by Nicholas Tate was such as would invalidate its terms and preclude the plaintiff from recovery thereon.

From the evidence it would appear that the alteration on the face of the assignment was made on a typewriter by inserting in the blank spaces of this printed form of assignment the name of the defendant, Daniel Burkhartsmeier Cooperage Company, and that the assignment of wages, commissions, claims and demands due from this company to Nicholas Tate was to extend up to and including the last day of October, 1936.

There is no evidence in the record which would tend to show that there was any understanding between the parties that this alteration should be made, nor the obligation that the assignment was to run for the period indicated in the contract. subsequently filled in on typervitor und recommendation of the president of the clintian country of the president of the clintian of the test that Micholas Tate delivered the east unent of the test the but efter kicholas I to left the oblining of interpolar.

It further expenses that Minuical and the entropy of the defendant company on the Man Minuical Start of Adventury, 1954, and that he reasined continuously in the entropy of the formant up to and including the 17th day of June, 1975; That on the 7th (you April, 1950, a notice of easign entropy served on the defendant company relative to the easies of Michoels of the analysis of April, 1955, to the 17th any of June, 1935, Michoels of the sesignor, earned while in the employ of the sevenant consent the sum of 110.

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There is no evidence in the record also can to such that there was any understanding ottoeen the action of this said and the coligation to the said action was to run for the period indicated in the constrat.

Upon this question the case of <u>Hayes</u> v. <u>Wagner</u>, 220 Ill. 256, has been called to our attention. This was an action in assumpsit for damages alleged to have resulted from the failure of the defendants to allow the plaintiff to perform a contract. The contract was altered by changing the amount to be paid for the work to be done from \$52,000 to \$54,600, changing the date of the completion of the work, and making other alterations in the contract. The court in that case said:

"A material alteration of an executory written contract destroys it as a basis of recovery by the person making the alteration, and the changes in this contract invalidated it as against the defendant, who did not consent to such changes. No recovery could be had upon the contract, either in its altered form or in its original condition, and it was wholly void."

In the case of <u>Gillett et al</u> v. <u>Sweat</u>, 1 Gilman, (6 Ill.)
475, the court said:

"So, if on the production of an instrument in Court, it appears to have been altered, it is incumbent on the party offering it in evidence to explain this appearance. I Greenl. Ev. 599, sec. 564. Every such alteration detracts from the credit of the instrument, and renders it suspicious, and this suspicion, the party producing it must remove."

The court further said:

"We need not cite authorities to prove, that any material alteration of a note, by which any of the parties to it, would be prejudiced, or where its terms are changed, so as to alter the relative liabilities of the parties, will destroy the legal effect of the entire instrument. And it was for the jury to judge, whether such an alteration had been made in this respect.or not."

See also Benjamin v. McConnell, 4 Gilman (9 Ill.) 536.

Upon the burden of proof, it was incumbent upon the plaintiff to show an authority or consent of Nicholas Tate to the interpolations if it wished to recover on this instrument. This rule was commented upon in the case of Merritt v. Dewey, 218 Ill. 599, It was there said:

"When the defendant had introduced evidence showing a material alteration the burden of proof then shifted to the plaintiff, and it was for him then (where he did not meet such evidence

Upon this on stion the order of Higher to the net, of 1].

356, has been onlised to pur attention. This is a north of a sessempath for dearness alleges to have monited from the line of the defendants to allow the obtaint of the entire the contract was altered by objecting the result to be if the the tork to be done from 152,000 to 854,000, aroughle the deal of the work, and asking other altered in the contract in that deal of the court in that deal of the sent of the

"A neterial alteration of an amatomy without contract destroys it as a massa of recovery of the arroad which the alteration, and the changes in this amatrot invalidated it as against the detendent, sac at a target to plan the secovery could be and usen to countrie, either in its altered form or in its original consistion, and it was wolly void."

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Lureanl. Uv. 538, asc. 584. The entire literation lets eta
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See also Renjamin v. consumali. A charge (v 111., oh .

"When the defendant had introduced wiserer sporter an triff; alteration the oursen of aroof then culted to the triff; and it was for him then (there he did not set out evictore)

See also Eggmann v. Nutter, 155 Ill. App. 390.

It is apparent from the record that the evidence is silent upon the authority of the Regal Radio Manufacturing Company, Inc. to interpolate the words we regard as material in this assignment of wages, which form was in blank at the time it was signed by Nicholas Tate, the assignor.

To the contention upon the question of alteration, the Radio Company has cited the case of White v. Alward, 35 Ill. Appl 195, where the court said:

"But this is not a case of alteration; the spaces were wholly blank and the delivery of commercial paper in that condition is authority to the holder to fill the blanks. Tiedeman on Com. Paper, Sec. 283; 1 Dan. Neg. Ins., Sec. 142; 1 Pars. B. & N. 33.

Nor is the execution of such authority confined to commercial paper. Bish. Con., Sec. 1174; Jewell v. Rock River Co., 101 Ill. 57."

The question of the authority to alter an instrument or to fill in the blanks is a question of fact. The record is not clear upon the question of Tate's authorizing the plaintiff to fill in the blanks in the manner in which it did, or that he waived the interpolation in the contract.

There is nothing in the facts submitted in this case to the trial court which would indicate that the authority to fill in the blank spaces was given by Tate to the plaintiff. As a matter of fact, the record does not disclose any evidence from which we would be justified in holding that the interpolations were authorized by Tate, the assignor.

For the reasons stated, the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN, P.J. AND HALL, J. CONCUR.

by denial) to slow that such alteration had seen ande under circumstances rendering it i ful or under discussions which, would not preclude a recovery by him." (Oiting cases)

See also Eggman v. Mutter, 155 Ili. . 70. 190.

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is affirmed.

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DENIS E. SULLIVAN, P.J. IND HALLS J. JC JU.

38419

CHICAGO TITLE & TRUST COMPANY, a corporation, as successor trustee,

Appellant,

₹.

GERTRUDE BLANKSTEN and SAMUEL BLANKSTEN, her husband, and A. E. COHEN et al., Appellees. 16

APPEAL FROM SUPERIOR
COURT. COOK COUNTY.

287 I.A. 627²

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a decree of the superior court entered July 18, 1934, upon the intervening petition of A. E. Cohen, filed May 17, 1934. The bill of complaint filed by plaintiff, Chicago A Title & Trust Company (hereinafter referred to as the trustee) February 13, 1932, alleged, substantially, that it was the successor in trust under a trust deed securing a series of bonds aggregating \$32,000; that Gertrude Blanksten and Samuel Blanksten, her husband, and Benjamin Weisberg and Bessie Weisberg, his wife, being indebted in the amount of said bond issue and to secure the payment of same, had conveyed certain real estate in Chicago by said trust deed; that certain defaults had occurred in the payment of principal, interest and taxes and that the successor trustee had accelerated the full amount of the balance due under the trust deed; and prayed for an accounting and for a decree of foreclosure and sale.

April 27, 1934, a decree of foreclosure and sale was entered wherein the court found that all the allegations in the bill of complaint had been proven and directed that the property

OHICAGO TITLE & TRUST COMPLEY, as corporation, as successor trustoe,

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GARTHUDA BLANKSTEN and SAMUEL BLANKSTEN, her husband, and A. L. CONEN et al., Dealess,

COURT, CORE COUNTY.

MR. THE IDER OF THE COURT.

This appeal seeks to reverse a decree of the superior court entered July 18, 1934, upon the intervening petition of A. E. Cohen, filed May 17, 1934. The bill of corplaint filed by plaintiff, Chicago 4 Title & Trust Company (hereinafter referred to as the trustee) February 13, 1932, alloged, substantially, that it was the successor in trust under a trust deed securing a series of bonds agrregating 35,000; that Scrtyude Blankston and Samuel Blanketen, her husband, one Benjamin .eich er and Bessie weisberg, his wife, being indebted in the amount of weid bond issue and to secure the pryment of time, had nonvoyed contain real estate in Chicago by said trust dead; the to out in der ults had occurred in the payment or principal, interest and taxes and that the successor trustee ind accelerated that that successor of the balance due under the trust deed; and pray o for an ee oun ing and for a degree of foreclosure and sile.

April 27, 1934, a decree of correlegations in the office that the court found that all the allegations in the bill of complaint had been proven and directed that the projectly

be sold by the master to the highest cash bidder for payment of the amounts due under said trust deed.

The intervening petition of Cohen alleged, in substance, that he was the owner of one \$100 bond of the issue "secured by the trust deed herein foreclosed;" that the bondholders were widely scattered and not in a position to purchase the property for their own benefit; that there would be no bona fide cash bidders at the sale; and prayed that the court fix an upset price and direct the successor trustee to "bid in and purchase the property herein foreclosed" in the event said upset price was not realized in cash at the sale.

June 15, 1934, plaintiff filed its answer to said intervening petition in which it averred <u>inter alia</u>:

"That under the terms and provisions of said Trust Deed, this respondent has no authority or power to purchase the premises conveyed thereby, and apply on account of the purchase price the indebtedness due the holders of the bonds and coupons secured by said Trust Deed, or due by reason of advances made by such holders of bonds and/or coupons secured by said Trust Deed, for solicitors' fees, stenographers' fees, Trustee's fees, documentary evidence, and cost of abstract and examination of title."

After reference to a master in chancery for the purpose of hearing evidence as to the value of the property and his report thereon, the decree appealed from was entered July 18, 1934, sustaining the allegations of the intervening petition, fixing an upset price and ordering that "in the event of there being no bona fide bidder for each for not less than the sum of \$27,400, then in such event the Chicago Title and Trust Company, as Trustee, be and is hereby authorized and directed to bid at such sale in its representative capacity for the use and benefit of itself and of all owners of bonds, the sum of \$34,255.11, being the full amount due in the Decree herein in the amount of \$38,455.11, less the amount now in the hands of the assignee of rents, which said rents are being held for the benefit of the bondholders, and which amount is in the sum of \$700,

be sold by the master to the highest cush bideer for payment of the amounts due under and trust deed.

The intervening potition of Cohen alleged, in substance, that he was the owner of one 0100 band of the issue "scoured by the trust deed herein foreclosed;" that the bancholdern seed their seattered and not in a position to surchase the property for their own benefit; that there would be no bone fife cash bidders at the sale; and prayed that the court fix an upset price and direct the successor trustee to "bid in and surchase the reserve herein form-closed" in the event said upset price as not realised in ouch at the sale.

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Denefit of the bondholders, and which amount is in the sum of 1700.

less such further amount as might reasonably be collected during the period of redemption, which sum the court finds to be \$3,500; that the Master in Chancery shall thereupon credit the amount of such bid by said Chicago Title and Trust Company, as Trustee, upon the amount found due it in the Decree of Foreclosure and sale here-tefere entered herein.

Pursuant to the decree of July 18, 1934, the sale of the premises was held by the master and plaintiff, Chicago Title & Trust Company, bid \$34,225.11 for said premises in accordance with said decree.

September 6, 1934, the master's report of sale was filed and approved and a deficiency decree entered against the mortgagors who were therein found to be personally liable for the amount of such deficiency. Thereafter, September 7, 1934, defendant Samuel Blanksten filed a petition in which after stating that he was the owner of the equity of redemption and tendering his assignment of the rents to the premises as well as a waiver of his right to redemption of same, he prayed that the deficiency decree entered against him be satisfied and discharged. On the same date an order to that effect was entered.

Plaintiff's theory is that under the terms of the trust deed, it had no power or authority to bid in the premises for the benefit of all the bondholders; that the court had no jurisdiction to so direct it; that, therefore, the decree appealed from was void; and that good title to the property cannot be obtained unless said decree is reversed and the property resold in accordance with the original decree of sale.

The intervening petitioner's theory, as stated in his brief, is that the trust deed in question permits "any party interested in the decree of foreclosure to bid at the foreclosure sale;" that "the

less such further shows as might resembly houghlest duting the period of redemption, which sum the cour times to be \$5,500; that the Master in Chancery that therepon credit the amount of such bid by said Chicago Title and Trust Company, as Trustee, the the amount found due it in the Secree of Scruclashies and a la here-tofore entered herein.

Pursuent to the decree or hall his live, the Live of the premises was held by the master and plaintiff, Unions fithe & Trust Company, bid \$34,225.11 for said premises in uson and with said decree.

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The interventing positioner's tacory, so take in his bains, is that the trust deed in question paraits "any party intervie d in the degree of social cause to bit to the for alonger and that "the

trustee placing upon this clause of the trust deed its logical interpretation caused to be entered a Degree of Foreglosure and Sale voluntarily and of its own metion, including in said decree an order specifically authorizing it to bid at the sale * * * certainly cannot now be heard to complain of its act in so doing;" that the "intervening petition was merely a logical sequence to this record and simply sought to carry out not only the terms of the trust deed but also the order of authority to bid caused to be entered by the Trustee in the original Decree of sae;" and that the trustee instead of at once appealing from the modified degree ordering it to bid, "voluntarily acted under the order of the court. bid in the property at the foreclosure sale and acted as trustee for a period of approximately one year before taking steps to appeal, at the same time, availing itself of the benefits of said decree, such benefits having been voluntarily taken" and has therefore waived its right to urge this appeal.

It is elementary that a party cannot appeal from an order with which it has voluntarily complied. (Williford v. Williford, 162 Ill. App. 24.) A party against whom an error has been committed may release such error, and if he voluntarily accepts benefits conferred upon him by the decree, such acceptance operates as a release of errors. (Schaeffer v. Ardery, 238 Ill. 557; Ruckman v. Alwood, 44 id. 183; Morgan v. Ladd, 2 Gilm. 414; Thomas v. Negus, 2 id. 700; 2 Cyc. 1007; 7 Ency. Pl. & Pr. 870.) One condition to the operation of the rule, however, is that the acceptance of benefits must be voluntary in the sense that the party is not required by the decree to do the act relied upon as a release of errors. It is urged that the modified decree of sale required plaintiff to bid at the master's sale in accordance with the provisions of said decree to avoid being adjudged in contempt of court.

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It is elementary that a party cannot seed from on order which it has voluntarily complied. ("Illi: ord v. 'Illirord, 162 Ill. App. 24.) a party against whom an error has been committed may release such error, and if he voluntarily accepts benefits conferred upon him by the decree, such acceptance operates as a release of errors. (Schaeffer v. Ardery, 258 Ill. 557; Kuchaun v. 1920, 44 id. 183; Morgan v. Ladd, 2 dilm. ala; Thomas v. Argus, 2 id. 700; 3 Gyo. 1907; 7 Mocy. Pl. & Fr. 870.) One schaiton to the operation of the rule, however, is that the acceptance of equired by the decree to do the sense that the sarty is not equired by the decree to do the set relied upon as a rele se of arors. It is urged that the modified decree of sale required

eas of said decree to avoid being adjudged in contenst of court.

But plaintiff could have avoided even that requirement by perfeeting an appeal from the modified decree of sale within the ninety days allowed under the Civil Practice act. This it failed to do. Instead it saw to it that such modified decree of sale included appropriate provisions whereby the trustee would benefit by the fees inuring to it for its services in administering the property. It is stated in the brief of the intervening petitioner. and not denied, that "the Trustee caused the court to enter orders specifically permitting it to operate, manage and otherwise deal with the property which it was about to purchase at the foreclosure sale." The modified decree of sale provided that the trustee was authorized in connection with the management and operation of the property "to pay itself a reasonable charge or fee for services performed in connection with the operation and management of said property, in addition to the fees allowed it in the decree of foreclosure and sale."

As heretofore shown the decree appealed from was entered July 13, 1934, and plaintiff did not file its petition for leave to appeal to this court until July 17, 1935, the very last day of the year within which such petition might be filed under the law.

Even though we assume that plaintiff was required under the modified decree to bid for purchase the property at the master's sale, it cannot be questioned that it voluntarily accepted the benefit of the decree by managing and operating the property for a year and receiving payment for its services in so doing. It is manifest that the conduct of the plaintiff trustee brings this case within the class of cases where a party's right to appeal from an order is barred by his acceptance of benefits thereunder or by his val untary compliance with its terms. (Schaeffer v. Ardrey, supra.)

But plaintiff coul N. vo voide even John Statistic but facting on appeal from the modified vecree of alle mithin the beli i i ald .ton coiton. I will edt tebru bowelle ayeb yjonin Instend it saw to it that woh woullied deered of tale .05 03 included appropriate provintions whereby the tracted vould benefat by the feer inuring to it for its services in remini tering the property. It is at tad in the brief of the intervening positioner, and not denied, that "the Trustee can on the rount to mary or the specifically pommitting it to operate, we may and other sine doed with the property which it was about to aurohat the reclosure The modified degree of tale previous of the trustee To nois age the counsetton with the warmand and ager tion of the property "to pay itself a resemble on res or fee for services bit on a connection with the operation and management of property, in addition to the fees ellowed it in the decree of toreclosure and sale."

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of sale was entered, was filed not only in behalf of the petitioner therein but in behalf of all the bondholders, and it is significant to note that none of the bondholders objected to the entry of the modified decree by the trial court or joined with the trustee in assigning error upon this appeal.

while in the view we take of this case, it is unnecessary to determine whether the decision of the Supreme court in the case of Chicago Title & Trust Company v. Robin, 361 Ill. 261, is controlling on the question of the right of the trial court to fix an upset price and order the trustee in the instant case to purchase the property at the master's sale, this cause, in our opinion, is distinguishable from the Robins case at least to the extent that the trustee here not only had the power to bid at the sale by virtue of the terms of the trust deed, but so construed the trust deed itself and submitted itself to the jurisdiction of the court by including in the trust decree of foreclosure and sale, which it prepared, presented and caused the trial court to enter, the following order:

"It is further ordered that either the complainant or any of the other parties to this cause, or any group or committee of bondholders, may become the purchaser or purchasers at said sale: * * *."

For the reasons stated herain the decree of the superior court and all orders entered subsequent thereto are affirmed.

AFF IRMED.

Friend and Scanlan, JJ., concur-

of sole and enterous was filten not only in behalf of the sole of the finar therein but in bentli of all the parkelent, and it is eignificent to note that the or one bentholders objected to the entry of the monifies there by an original with the trustee in entifying organ work the trustee in entifying organ works appearance.

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of the other parties to this cause, or any group or committee of the other parties to this cause, or any group or committee of bondholders, may become the purchasur or publicaers, as total

For the resmont to service the description of the up where court and all orders entered subscribes thereto ere affirmer.

Friend and Scanlan, J.J., concur.

38755

SAMUEL SKOLNICK, Appellee.

T.

EDDIE SOUTH.

Appellant.

APPEAL FROM CIRCUIT COURT,

287 I.A. 627

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a decree entered by the circuit court December 24, 1935, which dismissed defendant's counter-claim and enjoined defendant, South, "until September 16, A. D. 1936, from playing, acting, performing or rendering any service whatsoever in any manner contrary to any of the terms, provisions or conditions of said contract contained, as a musician or musical director for or on behalf of any firm. person or corporation, individually or in conjunction with any person, firm or corporation, any orchestra, theatrical or movie or recording company, or playing or performing in any manner contrary to any of the terms, provisions or conditions of said contract on any radio broadcast, except by and with the written consent of the plaintiff first had and obtained, unless it be an engagement obtained by the plaintiff." The court by the decree retained jurisdiction "for the purpose of requiring an accounting from defendant to plaintiff, Samuel Skolnick." Plaintiff filed no brief.

Plaintiff filed his complaint November 5, 1935, and an amended complaint November 21, 1935, praying for an injunction and an accounting, and defendant filed his answer to the

SAMUEL SKOLNICK, Appellee,

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COUTH, Appellant,

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This appeal seeks to rev race antorior by the circuit court December 24, 1955, hich dismisser i n ntis counter-claim and enjoined defundent, Louth, "until gt mber 16, A. D. 1936, from playing, acting, partorning or rencering service whatsoever in any manner sentracy to our o. the torms, provisions or conditions to anothing or contributed, a musician or musical director to ro to the his legal to the person or corporation, insividually or in conjugation with any person, Tirm or corporation, any orchestra, thestrical or movie or recording company, or pl. ying or performing in the transcript contrary to any of the terms, provisions or conditions of a ld contract on any radio broadcast, except by end alik the their the ed fi seein; , beni too bus had tort! littinialq out to tneango an engagement obtained by the plaintifi." The court by the decree retained jurisdiction "for the purpose of r ui in the accounting from defendant to plaintiff, manuel akolatick. tiff filed no brief.

Plaintiff filed his complaint ... ovember .., 1855, and an amended complaint Movember 21, 1935, praying for an injunction and an accounting, and defendent filed his answer to the

amended complaint and a counter-claim Movember 21, 1935.

September 9, 1931, South, an orchestra leader and violinist of some exceptional ability, entered into a contract with Skolnick and one Rothstein, as copartners, under the terms of which it was agreed that they were to have the exclusive management and control of defendant's services for five years, in return for which they guaranteed to pay him for such services a stipulated amount for thirty-five weeks of each year covered by the contract. It is conceded that Skolnick and Rothstein defaulted in their payments to South under the contract. August 2, 1933, plaintiff and defendant entered into an agreement, the pertinent portions of which are as follows:

"WHEREAS there is now in existence a contract between said South and one William R. Rothstein and Skelnick, as copartners, which said contract provides, among other things as follows: [recital follows of material provisions of that contract]

contract]
"WHEREAS said centract will have been in force for a
period of two years on September 9th, 1933, and during said
period, said South has not received the amount guaranteed by
the said William R. Rothstein and Skolnick, during the first

year of said contract; and

WHEREAS said South intends to serve notice upon said William R. Rothstein and Skolnick, on or before September 9th, 1933, in which he will notify said parties that he intends to cancel said contract and consider it terminated, unless the amounts therein specified, which he was to have received during the two years in which said contract was in force, are paid, and that if said sums are not paid, said South intends to file a bill in a court of equity to have said contract declared cancelled and of no force and effect; unless said contract is voluntarily cancelled by the parties thereto; and

"WHEREAS said South is desirous of entering into a contract with said Skolnick under which Skolnick will be his sole and exclusive Manager and representative, provided said contract hereinbefore referred to and set forth hereinabove is declared

cancelled and * * *,

"NOW, THEREFORE, in consideration of the covenants hereinafter contained, it is mutually agreed between the parties as follows:

"That if said contract, dated September 9th, 1931, by and between WILLIAM R. ROTHSTEIN and SAMUEL SKOLNICK, copartners, therein called Parties of the First Part, and EDDIE SOUTH, therein called Party of the Second Part, as hereinabove set out, is * * * voluntarily cancelled by the parties thereto * * * said SOUTH and SKOLNICK will immediately enter into a contract which said contract will contain the following terms and provisions:

"WHIMPAS there is now in existence a contract between copartners, which said contract provides, among other things as follows: [recital follows of meterial provisions or thet contract]

period of two years on September 9th, 1935, she with said period, said South has not received the amount war arted by the said william R. Hothstein and Shahnick, wring the first

year of said contract; and "WHEELAS said South intends to serve

illiam R. Rothstein and Akohick, on or before optember 5th, 1933, in which he will notify site prities that he intende to cancel said contract and consider it terminated, unless the factor therein specified, which he was to have equived furing the two years in which said castract was in loves, are pair, and that if said sums are not paid, or id outh intends to file a bill in a court of equity to have said contract coolered one colled and of no force and effect; unless that contract is

tract with said South is desirons of cherin into a cenend exclusive Manager and representative, provided said contract
hereinbefore referred to and set forth hereinclove as dealered
concelled and * * *

"MOV, THERETONE, in consideration of the covenants harding ster contained, it is mutually wared between the parties as follows:

"That if said contract, dated deptember th, 1831, by end between WILLIAM 1. OTHER-IN and . MU. I. KOLLICK, soperthers, therein called Parties of the Piret Part, and I. T.E. therein called Farty of the Lecond P.T., as hereinabove set out, is z = # voluntarily cancelled by the parties thereto * z = aid .OUTA and LECOLY WILL immediately enter into a contract which seid contract will contain the following terms and previsions:

- "1. SOUTH hereby appoints SKOLNICK as his sole and exclusive Manager and representative * * * beginning on or about the date of cancellation of the contract now in existence between one WILLIAM R. ROTHSTEIN and SKOINICK, as First Parties, and said SOUTH, as Second Party, dated September 9th, 1931, and continuing for a period of one (1) year from said date, with an option on the part of said Skolnick to renew said contract from year to year as hereinafter provided.
- "3. The said parties agree that the net profits earned from the services or performances of South shall be divided in equal shares by SOUTH and SKOLNICK, after deducting the salaries of the members of his orchestra, and all other necessary expenses incurred in connection with the operation and management of said SOUTH, and/or his orchestra.

*4. Said First Party guarantees that said Second Party will receive not less than SIX THOUSAND DOLLARS (\$6,000) as his share of the net profits and in the event his share of the net profits is less than \$6,000, said party of the first part promises to pay the difference between what said second party has received as his share of the net profits and SIX THOUSAND

DOLLARS (\$6,000).

"5. That said First Party shall have the option to renew said contract for a period of One (1) year under the same terms and conditions except as to compensation hereinafter provided, if SCUTH has received the sum of SIX THOUSAND DOLLARS (\$6,000) hereinabove mentioned, and all the terms and conditions of this contract have been performed by the party of the first part."

August 31, 1933, South, Skolnick and Rothstein agreed in writing to cancel the contract of September 9, 1931, which gave Rothstein and Skolnick, as copartners, exclusive management of South's services, and it was stipulated therein that South "agrees to release said parties of the first part from any and all liability for all moneys due or to become due under said contract."

Immediately after this cancellation agreement Skolnick proceeded with his exclusive management of South under the provisions of the agreement of August 2, 1933, and procured an engagement for him and his orchestra at the Regal theatre for the week commencing September 3, 1933. The net profits of this engagement were divided equally between South and Skolnick as provided in said agreement of August 2, 1933, as heretofore set forth.

September 16, 1933, an additional agreement was signed by Skolnick and South and attached to the written agreement of August 2, 1933. The additional agreement, after stating, "It is mutually

"1. SOUTH hareby point. I.IT listed is exclusive Langer and representative for be limin on or shout the date of concellation of the contrast no man allege one allege. The contrast of the condition of the continuing for a period of one (1) year from a in date, with an option on the part of acid Relation to menow a in contract from year to year as horein. Then provided.

"3. The enid parties gree that the at profits camed from the services or performances of outh shall be divided in equal chares by OUTH and COUNTON, after deducting the colories of the members of his orchestra, and all other necessary excurse incurred in connection with the operation and management of said forward in connection with the operation and management of said

SOUTH, and/or his orchestra.

"4. daid First Party Durrentees that said Second Dray Will receive not less than old HOUL DRAD OND DAME. ("6,000) as his share of the net profits and in the event his the less than 6,000, asin party of the last than 6,000, asin party of the list than preference between what if shear privations to pay the difference between what if shear privations as his where of the Let profits Table of Phylling DOKLANG ("6,000).

"5. That said First Porty shall have the posion to renew said contract for a period of One (1) ye rounder the ormeterms and conficient except as to compens that hereinster provided, if COUTH has received the un of the Eduard Fill (\$6,000) hereinsbove mentioned, and all the teach and conditions of this contract have been performed by the points of the fact."

August 31, 1935, Couth, Rednick and action agreed in writing to cancel the contract of appears 9, 1951, which gave Rothstein and Skolnick, as copertners, exclusive management of South's services, and it was stipulated therein that outh "egrees to release said parties of the first part from any and all liability

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September 16, 1935, an additional agreement was signed by Skelnick and South and attached to the written agreement of unust 2, 1935. The additional agreement, after atting, "It is mutually

agreed by and between the parties hereto that the within and foregoing contract be and the same is hereby amended as follows:"
(Italics curs) made certain modifications of and additions to the agreement of August 2, 1933, which are not material to the issues here.

Defendant contends that his contract with plaintiff went into effect August 31, 1933, when his prior contract with Rothstein and Skolnick was cancelled, the instrument of September 16, 1933, being on its face merely a modification of the agreement of August 2, 1933, which provided that if the contract of September 9, 1931, was voluntarily cancelled "South and Skolnick will immediately enter into a contract" (the terms of which were included in the agreement of August 2, 1933, as hereinbefore shown) or in any event that his contract with plaintiff went/effect not later than September 3, 1933, when Skolnick secured the first engagement for South and his orchestra under the terms of the agreement of August 2, 1933. and that the trial court erred in finding that Skolnick and South entered into the contract in question September 16, 1933; that the court erred in finding that South earned \$5,015.64 "from September 16, 1933, the date said contract was entered into, to September 11, 1934;" that the decree was erroneously entered because plaintiff did not exercise his option to renew the contract for the second year in apt time - time being of the essence of an option contract, whether so stated therein or not; and that the alleged tender was not made in apt time and in any event was insufficient.

While the instrument of August 2, 1933, was, in fact, an agreement to enter into a contract at a future time contingent upon the cancellation of defendant's previous contract with Skolnick and Rothstein, which was in default, it specified that upon such cancellation "South and Skolnick will immediately enter into a

agreed by and between the persies I reso the the fact to start to a form by the contract be and the the form by the contract be and the the contract beautiful tions of and a distance to the agreement of August 1, 1834, which we not autiful to the lawas here.

Materials content which his solution of the business inshinated misterier ill sort, ce to to to note . 1881, 18 tangar toolie otal and Exclaick we assectied, the inturest of a parabor 1, 1 3; being or trace mently a modification of the expression to the 2, 1933, which provided that if the share of care and a langua to 1 21, was voluntarily concelled "louth and Included the immediately enter into a contract" (the terms of fileh were included by the tone thevo yet also quies evoludaiered ar ales as taugut lo taem his centrect with plaintiff went/effect not 1. t.r and 3, 1933, when Ekoluick secured the first oughgrment for onth and his orchestra under the terms of the corement of dance 2, 190, and that the trial court errod in lineing that Achnick and conth entered into the contract in question optember log less; tant the court erred in finding that South e aned : 5, 35,60 "from suptember 16, 1933, the date and gentract was embered into, to eptember -minic estreost ser, and fluoromour, as serve to off their "1884] . If tiff did not exercise his option to remem the contract for the second year in apt time - time being of the common of a option contract, whether so stated therein or new; and the three linguistics

hile the im trument of manet 2, 1930, was, in ot, an agreement to enter into a contract of a future time continuent upon the cancellation of defendent's provious contract it relick and Rothetein, which was in default, it openified that upon such exacellation "Louth and cholaick will immediately enter into a

contract," detailing the provisions of same, including the provision that Skolnick was to receive half of the net profits accruing from South's services. That the parties, themselves, treated the contract provisions as set forth in the agreement of August 2, 1933, as being in effect immediately upon the cancellation of the prior contract is evidenced by the engagement of South and his orchestra for the week beginning September 3, 1933. It is reasonable to assume that it required some time prior to said date for Skolnick to procure this engagement. Skolnick's retention of half the net profits of this engagement is hardly compatible with his claim that his contract with South did not become effective until September 16, 1933. The only purpose and effect of the instrument of that date was to modify in certain respects, not material here. the contract set forth in the agreement of August 2, 1933, to which it was attached, the parties stating "that the within and foregoing contract be and the same is hereby amended." The construction that the parties to a contract put upon it by their own actions is the construction the court should adopt and it would be unfair and inequitable to hold that the contract was not entered into until September 16, 1933, when the instrument of that date specified that it was simply an amendment of the prior contract and it is conceded that plaintiff procured the engagement for South, commencing September 3, 1933, retaining half of the net profits from same.

The chancellor found in the decree that defendant earned \$5,015.64 during the year covered by the contract. It is difficult to understand how this figure was arrived at except by an endeavor to adjust defendant's earnings to plaintiff's tender of \$984.36 so as to arrive at a total of \$6,000, the amount due defendant the under/contract for his first year's service. It is undisputed

contract, a detailing the provisions of sure, including the provimion that Skolnick was to receive helf of the set profits secraing from South's services. That the purties, three-lives, threated the contract provisions or set forth in the greatest of great p. 1935, as being in offect immediately upon the cencellation of the grior contract is evidenced by the engagement of journal and his orchestra for the week beginning a greater C, 1933. It is reasonable to assume that it required some time prior to bain date for Skolnick to procure this engagement. Skolnick! rotention of helr the net profits of this engagement is herely some tible ith his claim that his contract with Youth ald not come entract with 1 September 16, 1933. The only purpole for first of the instrument of that date was to modify in certain respects, act material here, the contract set forth in the agreement of uguet 1, 1983, to which it was attached, the parties stating "that the within and foregoing contract be and the same is hereby emended." The construction that the parties to a contract pur apon it by their own setions is the construction the court should mort and it would be unfair and inequitable to hold thut the contract and not entered into until September 16, 1933, when the in trument of thet date specified that it was simply an enandment of the prior contract and it is conceded that plaintiff procured the engagement for South, commencing September 3, 1935, retaining hale of the act . Omas mort etilore

The chanceller found in the decree that defendant earned \$5,015.64 during the year covered by the contract. It is difficult to understand how this figure was arrived at except by an enderwor to adjust defendant's countings to plaintiff's tender of 984.6 so as to arrive at a total of \$6,000, the amount due defendant under/centract for his first year's service. It is undisputed

that the total amount received from Skolnick by South under his contract was \$4,798.27. Plaintiff testified that he also made a number of loans to defendant aggregating \$185, which defendant denied. Plaintiff testified further that he advanced to defendant \$250 for railroad transportation. He was forced to admit that this amount was properly charged by him as an expense and was collected by him from defendant's earnings. We are convinced from the evidence that all that South received from Skolnick during the year the contract in question was in effect was the aforementioned amount of \$4.798.27.

Did plaintiff exercise his option to renew the contract for the second year within apt time and did he make a sufficient tender within apt time? As related to the exercise of an option, time is of the essence of the option contract whether so stated in express language or not. (Northern Illinois Coal Corporation v. Cryder, 361 Ill. 274.) We have shown that the contract between the parties for the first year became effective not later than September 3, 1933. South was entitled to receive \$6,000 from Skolnick under the contract for his services for the year. An option is a mere offer and, unless it is accepted within the time limited, it is of no force for any purpose. (Upton v. Traveler's Insurance Co., 2 A. L. R. 1597, 178 Pac. 85.) Thus, in order for plaintiff to have exercised his renewal option within the requirements of the contract, it was me cessary that he tender defendant \$1,210.73, the difference between \$4,789.27, which her eceived, and \$6,000, which he should have received, instead of \$984.36, which he testified he did tender, and that such tender in the proper amount be made not later than September 3, 1934, the expiration date of the contract, calculating one year from September 3, 1933, when defendant's first engagement under the contract that the total emount received from choluter by Louth under hill dentract was id, 998.27. Elaintiff testified that he also made a number of loans to defendent any regating \$185, which cefendent denied. Plaintiff testified further that he are available to defendent \$250 for reilroad transportation. He was forced to admit that this amount was properly charged by him from defendent's earnings. See servinced from the evidence that call that bouth received from kelnick during the year the contract in mestion was in affect who the sacurationed amount of \$4,798.27.

Did plaintiff exercise his option to rene the omtract for the second year within apt time and wir he were a sur frient tender within aps time? As related to the energies of a option, time is of the essence of the option contract whither se chate in express language or not. (Morthern Illineis forl Joryeration v. Gryder, 361 Ill. 274.) . e have thown that the contract b tasen the parties for the first year became effective not later than September 3, 1933. South was entitled to receive 6,000 from Skolnick under the contract for his service a for the service option is a mere offer and, unless it is equipted within the time Limited, it is of no force for no purpose. (), ton v. Traviler's Insurance Co., 2 .. L. R. 1557, 178 Pac. 85.) That, in order for splaintiff to have exercised his renewal option the requirements of the contract, it was meens my that he tender defenint \$1,210.75, the difference between ',789.37, which her eseived, and \$6,000, which he should have sectived, instead of \$84.50, which he testified he die tender, and th t unit testifies and doing proper amount be made not later than appropriate of 191 , the moult the and initialization of the of the orange in the state of the moultain and the contract of the contrac September 3, 1933, then defendant a first engressent under the contra

began. Plaintiff's tender in the insufficient amount indicated was not made until September 11, 1933. We are impelled to hold that plaintiff's tender was insufficient, that it was not made in apt time and that his option to renew the contract for a second year was not legally exercised. The record before us affords no basis, legal or equitable, for the decree in this cause granting injunctive relief.

It is impossible from the record to ascertain how the chancellor resolved plaintiff's claim as to the loans aggregating \$185 he testified he made to defendant. The evidence is not convincing that plaintiff should be allowed credit on account thereof. Inasmuch as it is uncontroverted that defendant received only \$4,789.27 under the contract instead of the \$6,000 he was entitled to receive thereunder from plaintiff, defendant's counter-claim for the balance due him under the contract, amounting to \$1,210.73, should have been allowed.

Other points are urged for reversal, but in the view we take of this cause we deem it unnecessary to discuss them.

For the reasons indicated herein the decree of the circuit court is reversed and the cause is remanded with directions to dissolve the injunction, to dismiss plaintiff's complaint for want of equity, to allow defendant's counter-claim and to enter judgment thereon in the amount of \$1,210.73.

REVERSED AND REMANDED WITH DIRECTIONS.

Friend and Scanlan, JJ., concur.

began. Plaintiff's tend of in the inputations of the inputation of made until September 11, 1953. To the impulse that that plaintiat's tender was insufficient, that it was not as that plaintiat's tender was insufficient, the contract of the contract of the second year was not legally exercited. The two is before until affords no basis, legal or equitable, to the contraction in this case greating injunctive relief.

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take of this cruse we deem it unnime only to disour them.

For the reasons indicates herein the ecores of the circuit court is reversed and the sense is remanded with directions to dissolve the injunction, to dismise plantiff's complaint for well of equity, to allow detendant's country-claim and to sates (10);—ment thereon in the amount of \$1, 10.75.

PARTY OF THE STREET MI CHE LANDINGS

Friend and weamlan, JJ., concur.

38788

AUGUST A. ZAVADIL,
Appellee,

V.

FORREST H. NORRIS, executor of the estate of Albina P. Norris, deceased,
Appellant.

18

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

287 I.A. 6274

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

The claimant, August A. Zavadil, filed a claim in the probate court November 19, 1934, against the estate of Albina P. Norris, deceased, on a note for \$1,000. February 6, 1935, the claim was allowed for \$1,146.76 as a sixth class claim. An appeal was taken to the circuit court by the executor of the estate and that court, after hearing the cause without a jury, also allowed the claim in the same amount. This appeal followed.

The note in question was an ordinary judgment note for \$1,000, dated January 2, 1930, payable in Chicago one year after date and signed as follows: "Albina Palecek Norris, M. D.,

Pres. Longview Realty Tr. Benjamin H. Palecek, Treas."

It appeared that Joseph Palecek, his wife, Anna Palecek, their two children, Albina Palecek Norris and Benjamin H. Palecek, and the latter's wife, resided, in 1923, in Feeding Hills or Agawam, which was a suburb of Springfield, Massachusetts; that Joseph and Anna Palecek owned vacant property there, which they were subdividing; that they were required by the municipal authorities to install water pipes in the subdivision; that they

38788

AUGUST A. ZAVADIL, Appelles,

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FORFIST F. NC. IL, exceptor of the estate of Albina F. Morris, deceased, Appellant.

APAINT, PROMICE OF COUNTY,

MH. PR. IDEAS TORIS OF THE COURT.

The claimant, August A. Zovadil, filed or claim in the probate court November 19, 1004, again to the entity of claims of claim was allowed for 'l, AG. 18 or claim was allowed for 'l, AG. 18 or catth older claim was taken to the circuit court by the electron of the batate and that court, after hearing the claim of the fury, alter hearing the claim of the claim in the same amount. This ampeal followed.

The note in question was an ordinary judgment note for \$1,000, dated January 2, 1950, payable in thicago one year efter date and signed as follows: "Albina Pelecek Jorris, K. T., Fres. Longview Realty Tr. Danjamin H. . alsock, Trans."

It appeared that Joseph elect, hi wife, and relacing, the their two children, which walecek worse and Renjamin H. Ialest, and the latter's wife, resided, in 1923, in Receing Hill or Agawam, which was a suburb of pringfield, Massachusett; that Joseph and anna ralecek owned vecant property there, which they were subdividing; that they were required by the municipal sutherities to install water pipes in the subdividing th that they

were short of the funds necessary to comply with these requirements; that in December, 1923, both Albina Palecek Norris and Benjamin H. Palecek solicited claimant, who resided in Chicago and is an uncle of the latter's wife, for a loan of \$1,000; that claimant forwarded to Joseph and Anna Palecek a cashier's check drawn by the cashier of the Kaspar State Bank in Chicago for \$1,000, dated January 7, 1924, and payable to their order, which was indorsed by them and paid in due course; that at the time claimant made the loan to Joseph and Anna Palecek, Albina Palecek Norris and Benjamin H. Palecek executed their personal note to Zavadil for \$1,000 (this note was not presented in evidence) and December 27. 1927, a note for the same amount was given to claimant, signed by Albina Palecek Norris and Benjamin H. Palecek; that the interest was fully paid on the indebtedness until January 2, 1930, when the note in controversy was executed and accepted by claimant in renewal of the note of December 27, 1927; that June 29, 1925, December 26, 1925, and June 24, 1926, semiannual interest payments of \$30 each were made to claimant on the loan by checks on the West Springfield Trust Company, having printed on the face thereof in large letters "Longview Realty Trust" and signed "Dr. A. P. Morris, President, Benjamin H. Palecek, treasurer; that June 12, 1927, December 16, 1927, and December 20, 1928, semiannual interest on the loan was paid to the claimant by checks payable to him drawn on the First National Bank of Berwyn, Illinois, and signed "Dr. A. P. Norris, Pres. Trustee, Longview Real ty Trust." It also appeared that a common law trust was organized May 19, 1934, of which Albina P. Norris, Benjamin H. Palecek and one Thomas P. Shea, an attorney, who later resigned, were trustees; that the trust instrument creating same was recorded as required by law May 20, 1924, in the office of the Registrar in Hampden county, Massachusetts; that May 19, 1924,

were short of the funds necessary to comely with these reuirements; that in December, 1923, both Albina Jales & dorris and Benjamin H. Palecek solicited elament, and resided in Chic of and is an uncle of the latter's wife, for a lose of 1,000; that does a training a storage sent one despot of bebraved immisio drawn by the cashier of the Kasper State Bank in Chicago for \$1,000, dated January 7, 1924, wid proble to their order, which was indorsed by them and paid in due course; that at the time alaiment made the loan to Joseph and Anna Palenck, Allina Palecck form of and Benjamin H. Palecek executed their personal note to assail for \$1,000 (this note was not presented in cvidence) and Desamber 27, 1927, a note for the name amount was given to claiment, signed by Albina Pelcock Morris and Benjamin H. Palecek; that the interest was fully paid on the indebtedness us il January 1, 1930, when the note in controversy was executed and accepted by claimant in renewal of the note of December 27, 1927; that June 29, 1935, Dacquer 26, 1925, and June 24, 1926, semisandel interest payments of 130 each blo in ming's table old no sabado ye asol out no tapmialo of obem orow Trust Company, having printed on the free thereof in large letters "Tongy Realty Trust" and sengie bagis are Trust with welvent, Benjemin H. Palecek, tremaurer," that June 12, 1927, Luckher 10, 1927, and December 20, 1928, semiannual interest on the loan wes paid to the claimant by checks payable to him dram on the First Wational Bank of Errays, Illinois, and signed "Nr. .. F. Worris, Pres. Trustee, Longview Real ty Trust. " It also spicared that a common law trust was organized May 19, 1934, of which Abina P. Morris, Benjemin H. Palecek and one Thomas P. Shea, am attorney, who later resigned, were trusters; that the trust instrument creating some was recorded as required by law May 20, 18.4, in the office of the Registrar in Hampden county, Las achusetts; that May 18, 1924,

when the trust agreement was executed, Joseph Palecek and Anna Palecek, his wife, conveyed to the trustees of said trust the vacant property being subdivided and received certificates representing the entire beneficial interest in the trust; that the certificates of beneficial interest entitled the holders thereof to a dividend of the profits and ultimate proceeds of the trust but to no interest in the trust property itself; and that the entire control, management and title to the trust propertywere vested in the trustees with power to improve and develop the same and "to execute and deliver instruments in writing which they may deem necessary in the execution of their powers."

Oscar Wernhoff, a disinterested witness, who had lived with the Palecek family for many years, testified that the proceeds of the \$1,000 loan were spent "for street pipes and material for improvements on Longview Heights;" that claimant visited the property, which was the subject of the trust in 1925, and that in September, 1931, the witness was present at a conversation in which claimant asked Benjamin H. Palecek "if there would be enough property in Longview Heights to cover its note" and Palecek replied that there was.

The question presented for our determination is whether under section 20 of the Illinois Negotiable Instruments Law (par. 40, sec. 20, ch. 98, Ill. State Bar Stats., 1935) the note involved created a trust obligation or an individual obligation. Sec. 20 provides as follows:

"Where the instrument contains, or a person adds to his signature, words indicating that he signs for or on behalf of the principal, or in a representative capacity, he is not liable on the instrument, if he was duly authorized; but the mere addition of words describing him as agent, or as filling a representative character without disclosing his principal, does not exempt him from personal liability."

It is reasonable to infer that when Albina Palecek Norris

when the trust appeared was executed, so uph Paleack on and Paleack, his wife, conveyed to the trustees of rate tract the seast property being subdivided and received corality test representing the entire beneficial interest in the trust; that the certificates of beneficial interest in the trust; the boldest cherent to a dividend of the profits and ultimate proceeds of the trust but to no interest in the trust property itself; and the entire control, management and title to the trust property were vested in the trustees with power to improve and asvelop the same and "to execute and deliver instruments in satisface which they may deem necessary in the execution of their powers."

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Occar Wernhoff, a disinterested witness, the had lived with the Palecek femily for many years, testifies that the proceeds of the \$1,000 lean were epent "for etreet pipes and moterial for improvements on Longview Heights;" that claiment visited the property, which was the subject of the trust in 1925, and that in Reptember, 1931, the witness was present at a convers tion in which claiment applied Benjamin H. Palecek "if there would be enough property in Longview Heights to cover its note" and Palecek Poplied that

The question presented for our determination is their wanter wander section 20 of the Illinois degotiable Instruments Law (par. 40, sec. 20, ch. 98, Ill. State For tate., 1848) the note involved greated a trust obligation or an individual coligation. Sec. 20 provides as follows:

"Where the instrument contiins, or a person acts to his signature, words indisting that he signs for or on b hal. of the principal, or in a representative capacity, he is not liable on the instrument, if he sas duly authorized; but the mate at it on of words describing him as agent, or as filling a represent two character without disclosing his principal, do s not exampt him from personal liability."

It is reasonable to infer that when Al ina Palecek Norris

and her brother Benjamin H. Palecek requested claimant in December, 1923, to make the loan, they did so in behalf of their parents, Joseph and Anna Palecek, since, when Zavadil decided to make the loan of \$1,000, the check for that amount which he forwarded to Joseph and Anna Palecek was made payable to them. The evidence in the record is conclusive that the loan when made was not made to the deceased Albina Palecek Norris, in whole or in part, and that she received no individual benefit therefrom. The evidence sufficiently shows that her parents, the owners of the vacant land heretofore referred to, in subdividing same, were pressed for money and used the proceeds of claimant's loan, unquestionably made to them, for the purpose of purchasing water pipes for installation in said premises.

When the trust was organized shortly after the loan was made by claimant to Joseph and Anna Palecek and they conveyed the property to the trust, it was natural and proper that the trust would assume the obligation of paying the loan since the property which was the subject of the trust had received the benefit of same. That the trust did assume this obligation is evidenced by the six interest checks which were paid by it to claimant. The fact that deceased and her brother signed one or two accommodation notes in which they individually promised to pay the loan may only be considered as evidence bearing upon the liability of Albina Palecek Norris on the note of January 2, 1930, and is certainly not conclusive of her liability. Repayment of this loan was never her obligation. Primarily it was the obligation of her parents and after the creation of the trust, to which the property which recaived the benefit of the loan was conveyed, it was assumed by the trast, as is clearly shown by the evidence. Albina Palecek Norris and Benjamin H. Palecek as the sole surviving trustees of the Longview Realty Trust had express authority under the trust agreement

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to berrow money to develop the trust property and to execute appropriate instruments to evidence loans for such purpose. A fortiori they had authority to execute a note to pay a loan made by the beneficiaries of the trust to develop such property. When Zavadil received the note, executed as it was, the manner of its negotiation was sufficient to put him on notice that it was the note of the Longview Realty Trust. Although the burden was on the claimant to show, if he could, that Dr. Norris and Benjamin H. Palecek were not authorized to execute the note for the trust, he failed to assume that burden, but in any event the evidence is conclusive that they did have such authority. They were executing on behalf of the trust an evidence of indebtedness as shown by the name of the trust immediately below the name of Albina Falecek Norris, with the abbreviation "Pres." immediately after her name and preceding the name of the trust, indicating her representative capacity. For that the legislature has declared she is not personally liable. (Mathis v. Liberty Straw Spreader Co., 238 Ill. App. 467.) The claimant knew when he accepted the note upon which his claim is predicated that it was signed differently from the note it renewed; that, the loan having been made to their parents, Albina Palecek Norris and her brother signed the previous note or notes merely as accommodation makers: that he had received interest checks for several years from the trust and not from Albina Palecek Norris, personally; and that the loan was not made to Albina Palecek Norris and Benjamin H. Palecek and that the indebtedness was not theirs.

The note in question evidenced an obligation for which
the trust recognized its liability. It was signed in a
representative capacity and the name of the principal was disclosed on its face. Albina Palecek Norris and Benjamin H. Palecek

to borrow money to develop the trust property and to execute appropriate instruments to evidence leans for such purpose, A fortlori they had authority to execute a note to pay a loan made by the beneficienter of the trust to device property. when lavadil received the note, emeatted as it was, the memor the accordation was sufficient to but him on motion then to was the note of the Lon, view healty Trust. Although in burden was on the claimant to show, if he could, that us. worrie and Benjamin H. Palecak were not achorized to ecounte the not for the trust, he failed to assume that burden, but in er event the svidence is conclusive that they did have such subjectly. They were executing on behalf of the trust an ovil nee of inwolld where is much that to sman sait to moon as anothered the name of Albina Falceck Worris, with the abbreviation "Free." immediately after her name and proceeding the name of the truet, indicating her representative capacity. For that the legiclature hau declared she is not personally liable. Mathis v. Liberty The cl iment loss, then Straw Spreader Co., 238 111. (pp. 467.) he accepted the note upon which his cluim is predicated that it was signed differently from the note it I newed; that, the loan having been made to their parents, absira cheech lovels and her medianed the previous note or notes men ly come or consolaution arest farthe had received interest checks for several years from the trust and not from Allina Jalcook gorains postern lly; on, simo, west a made to them a lock and tadt, bas Benjamin H. Pelecek and that the indebtedness as not theirs. The note in question evidenced un obligation or which the trust recomised its lightity. It was almost in a representative capacity and the name of the resulpst ass dis-

closed on its face. Albins Releask forris and Benjamin H. rainock

were not only the president and treasurer, respectively, of the trust but they were the only surviving trustees of same and they had authority to execute the note. Sec. 20 of the Negotiable Instruments Law declares that under such circumstances there is no personal liability. Whenever a form of instrument is such as to fairly indicate to the eye of common sense that the maker signs as agent or in a representative capacity, he is relieved of personal liability if duly authorized. (Hawthorne v. Austin Organ Co., 71 Fed. (2d) 945.)

In <u>Gutelius</u> v. <u>Stanbon</u>, 39 Fed. (2d) 62, where a note was signed "Harry Stanbon, William M. Nye, Walter H. Hill, Trustees of Stanbon, Nye and Hill Realty Trust," the trust being a common law trust holding real estate, and where such trust purchased certain lands in Florida, executing four purchase money notes, signed as above indicated, in part payment, two of which came into the hands of a <u>bona fide</u> purchaser for value, and a receiver of a bank brought an action on same against both the trustees individually and the trust, the court, after quoting section 20 of the Negotiable Instruments Law, said at pp. 623-24:

"This statute apparently re-enacts the established rule of the common law applicable to contracts of agents made on behalf of a disclosed principal. It had been universally held, in the federal courts at least, that an instrument bearing on its face all the signs of being the contract of the principal could not be held to bind the agent personally. * * *

"In the view I have taken of the matter, it is unnecessary

"In the view I have taken of the matter, it is unnecessary to determine whether the plaintiff, as holder in due course of the note, is bound by the previsions of the declaration of trust exempting the trustees from personal liability. The statute effectually does that if they add to their signatures words indicating that they sign in a representative capacity, disclose their principal, and are duly authorized. Respecting the obligations upon which this cause of action is predicated, the defendants have added to their signatures words indicating that they signed in a representative capacity. They disclosed their principal, and they were duly authorized. Therefore they are not liable on the instrument."

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were not only the president and treasurer, respectively, of the trust but they were the only surviving trustees of same and they had authority to execute the note. See. 20 of the degotiable Instruments have declares that under such circumstances there is no personal liability. Thenever a form of instrument is such as to fairly indicate to the eye or common sense that the maker signs as agent or in a representative capacity, he is relieved of personal liability if only authorized. (Magthorne v. Austin organ personal liability if only authorized. (Magthorne v. Austin organ

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In Charles Nelson Co. v. Morton, 288 Pac. 845, where the note was signed "Trustees of Greater San Francisco Speedway Association [a trust] Fred Morton, Pres. C. C. Loser, sec.," and the trust involved was a pure trust to build a speedway, which had power to issue notes and borrow money, the court, adopting in large measure the opinion of the trial court, quoted therefrom as follows, on pp. 849-50:

"But the law itself makes section 3101, Civil Code, part of the note, and that section is to be liberally construed in the interest of harmony. Hence, when the note and the statute are read together, with a liberal interpretation given to the word 'principal,' there is no variance of the terms of the note. The statute, liberally construed, says in substance that when the estate [or principal] is disclosed either in the body of the instrument or in the form of the signature, exemption from personal liability follows as effectually as if, after signing his name, the trustee had added, 'as trustee but not individually' or 'as trustee but not otherwise.'

"In the interest of commerce, it has been the policy of the law to exercise great tenderness toward the holders of commercial paper. Yet, after all, there is nothing sacrosanct about a promissory note; and section 20 of the Negotiable Instruments Act was meant to banish some of the extreme technicality which had led to confusion and incongruities in adjudicated cases in different jurisdictions. The provision granting personal exemption when the note indicates on its face that it was made on behalf of a disclosed principal, or by one filling a disclosed representative character and acting in his representative capacity, effectuates the desuetude of a vast array of technical and confusing precedents.

"Decisions, for example, may easily be found declaring that unless disclosure of the principal is made in the body of the note, the agent, whatever his powers, does not succeed in avoiding liability for himself by words of designation or description annexed to his signature. But the statute now provides that if proper indication of the representative capacity of the signer is given either in the note or in the signature the disclosure is sufficient for his relief. Any phraseology which 'indicates' to the ordinary mind that the signature is made in a representative capacity will suffice for the purpose; and all persons dealing with the note are bound to take cognizance of its indications and

"In the note before us it would be vain to deny that the signature indicated the representative character of the signers, and at the same time met fully the requirements of the law in disclosing 'the principal' to be bound. The signature gave the business name of the principal, and that principal was specifically designated as 'A trust.' Consequently, when the Charles Nelson Company accepted transfer of the note from the payee, The Charles Nelson Company was charged with notice that Morton and Loser, describing themselves respectively as president and secretary of

In Charles Melson Co. v. Morton, 288 rec. 8.5, where the note was signed "Trustees of Greater San Francisco speeding Association [s trust] Fred Merten, Free. C. C. Locer, sec.," and the trust involved was a pure trust to build a speedway, which had power to issue notes and borrow money, the court, sdopting in large measure the opinion of the trial court,

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the 'Trustees of Greater San Francisco Speedway Association, a Trust,' were acting not as principals, but in alieno jure for a named trust and that by force of the statute they were exempted from personal liability as fully as if the note had formally stated in its body that the obligation was that of the trustees 'in their capacity as trustees and not otherwise' or 'as trustees but not as individuals.'

"While they are not agents, the trustees have their duties to perform; and the effect of the statute is to charge them in respect of the property to which their representative duties attach; and not to require payment out of their private funds, in the event that the trust property should prove insufficient. In a case of agency, there is a principal to be charged; and in the case of a trusteeship there is the trust estate. The representative character in both cases has such kinship that under the broad language of the statute no well-founded distinction can be made as to the exemption from liability."

Inasmuch as Albina Palecek Norris was authorized to execute the note in behalf of the trust estate and she signed same in a representative capacity, disclosing by her signature on the face of the note the name of the estate, in our opinion no individual liability attached by reason of her execution of the note.

Other points are urged, but in the view we take of this cause we deem further discussion unnecessary.

For the reasons stated the judgment of the circuit court is reversed and the cause remanded with directions to disallow the claim.

REVERSED AND REMANDED.

Friend and Scanlan, JJ., concur-

the 'Trustees of Greater and Prancisco peddag assocition, a Trust,' were acting not as principals, but in slienc jure for a named trust and that by force of the statute they sere exampted from personal liability as fully as if the acts has formally stated in its body that the obligation was that of the trustees in their capacity as trustees and not otherwise! or lest trustees but not as individuals.!

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. C CHARL P CRA CLEAR VEH

Friend and .canlan, JJ., concur.

the claim.

38826

JOHN WIEDEMEYER,

Appellee.

VS.

MRS. JOHN VIVIER and MUNICIPAL EMPLOYMES'ANNUITY AND BENEFIT FUND OF CHICAGO,

Defendants Below.

MRS. JOHN VIVIER,

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

287 I.A. 6281

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, John Wiedemeyer, brought an action in the Municipal court against defendant, Mrs. John Vivier, for moneys alleged to have been advanced to her in the months of Cotober. November and December, 1934, during the life of her former husband. Defendant being a nonresident of Illinois, plaintiff filed an affidavit for a writ of attachment in aid, in which the Municipal Employees' Annuity and Benefit Society was named as garnishee. The garnishee filed its appearance and answer, and, subsequent to service by publication, defendant filed her appearance and affidavit of merits to plaintiff's amended statement of claim. The Retirement Board of the Municipal Employees' Annuity and Benefit Fund of Chicago, designated and served as garnishee under the name of the Municipal Employees' Annuity and Benefit Society, in its answer to the writ of attachment in aid, stated *that the said Retirement Board has in its control and under its supervision the sum of \$715.52 belonging to said Mrs. John Vivier (known to the garnishee as Mrs. Betty Wiedemeyer) due and payable to her as a refund under certain provisions of the law governing the Municipal Employees' Annuity and Benefit Fund of Chicago." Upon trial of the original action upon its merits by the court without a jury on November 19, 1935, the issues were found in

JOHN WILDWAYIN,

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MRS. JOHN VIVIEW and HURL ITAL EMPLOYERS ASAULTY AND DEED THE BUND OF UNIVACED DEFENDED LEDGE.

RS. Juda vivish, Appellant.

The state of the s

287 A. I. 782

IN. FREELING VUSTIGE COLLIVES NATIVES OFFICE OFFI

Plaintiff, John Medeweyer, brown to which the to Municipal court ag inst defanacht, arm. To . . . ivi. v. sileged to have been atvance: 'a r i "Movember and December, 1934, Buring See alie of ear Scaler or Defendant bein a monren out of this is, as inches filed an affidavit for a writ of which are well ... Municion Employees Accounty on Largith which terry one has ed ac The garnishee fired the sarwice a warr, or . garnishee. subsequent to service by mutil liter, interest to service and and a generance and stitusers of adices to stranife and energy of olaim. The Retirement Loose of the Lucional Manleyees arriter and Benefit Fund of Chicago, designated describes error entitled Society, in its snewer to the rit of attendant at all, state c sel is at the said Retirement about all sel all services in realised bire and tant' supervision the sum of 5716. Statement in the state of netsivregue (known to the gar isnee as are. Betty 'indansyer) the to her as a refund under certain provider a of the letter of the or the Municipal amployees' anartic and remarks and of classes." Upon trial of the original action woon its merits by the buit without a jury on Rovert r 1., 181., televis a tree for the tank

favor of plaintiff and judgment entered against defendant for judgment \$1000. Immediately after entry of this judgment the court entered/against the garnishee defendant upon its answer for \$715.52 for the use of plaintiff. Both judgments were included in the one judgment order. It is only from the judgment against garnishee that the defendant, Mrs. Vivier, prosecutes this appeal.

Defendant contends that the funds in the possession of garnishee scught to be garnished are exempt from garnishment and attachment under para. 797, sec. 60 of the act governing the Municipal Employees' Annuity and Benefit Fund of Chicagi, (ch. 24, Ill. State Bar Stats. 1935) which is, in part, as follows:

"All annuities, pensions, and disability benefits granted under the provisions of this Act and every portion of such annuities, pensions, and benefits, shall be exempt from attachment or garnishment process * * *."

Plaintiff's answer to defendant's centention as stated in his brief is as follows: "When the widow of a member of the Municipal Employees' Annuity and Benefit Fund of Chicago remarries, she is ipso facto no longer considered a beneficiary or annuitant under the act creating the Municipal Employees' Annuity and Benefit Fund of Chicago. From the moment of her remarriage she can no longer claim the rights of a beneficiary or an annuitant. The act specifically terminates that status. Her only remaining right under the act is to a refund, if any exists. This refund under the statute is the difference between the amount accumulated irom the sums deducted from her husband's salary and the amount paid to her while she was a widow entitled to an annuity. In the case at bar, the Municipal Employees' Annuity and Benefit Fund of Chicago became the debter of Mrs. Vivier, the former widow of John Wiedemeyer, for a refund of \$715.52. This sum belonged to Mrs. Vivier absolutely and without restrictions.

"Mrs. John Vivier filed an affidavit of merits to the

favor of plaintiff and jurgment above again a define at for jurgmen.

\$1000. Immediately after entry of this jurgmen, the court cuter dagainst the parnituse defendant when his yearer for \$715.30 for the use of alintiff. Poth jud deste were included in the one judgment order. It is only from to jungment order. It is only from to jungment order.

Desendant contends to a more runts in the cusus of garnishee sought to be garnished are arrespt from garnished and

the defendent, are. Vivier, presented and enter

attachment under para. 797, 200. 00 0.00 .00 entring the .unictpal Employees' whulity and schedic limit of oricage, (or. 24, 11). State Ber State. 1935) which is, in ore, as colors:

"All amulties, persions, as classified the transed under the provisions of rais Act and every contion of suct menutaties, pensions, and benefits, said be enough from the content process at a."

ni bars a ne wit letnes a'dan latter of rewell a' Tribnisis his brist is as follows: "Wasa to wakiw to was " is a si ising sid cipal Amployees' Amouity and Benefit Fund of Jaiove remarries, The reban tas in the ac yesisitered a ferebishes regard on otosi eagl al the act creating the Municipal Employees' amounty at morning and From the moment of wer recurriste the can no longer of Chicago. disim the rights of a beneficiary or we emaitent. . e act specific cally terminates that status. For only rectiful rich ander the act is to a redund, if any exists. This red and under the circuite is the difference between the amount accumul to I. ... sam "educted from her husband's satury in the until of it is her wile ent , the day sees alt in .vitume no of beltime wohlw a saw size Municipal Employees' Arruity and Serefit run of . Longo recense the debter of krs. Vivier, the former witer of Lan. lederever, for a refund of 9715.52. This sum belonged to are. Vivler ebsolutely and

"Mrs. John Vivier Pilled at affidavit of merits to the

without restrictions.

amended statement of claim filed by plaintiff. She did not file an answer to the garnishment proceeding. The only answer filed to the attachment was that of the Retirement Board of the Kunicipal Employees' Annuity and Benefit Fund of Chicago. Mrs. Vivier took no exceptions to the answer filed by the board. That answer clearly admits that the board is holding the sum of \$715.52 due and payable to her as a refund because she is no longer the widow of John Wiedemeyer. No issue having been joined upon the answer filed, the averment of facts therein stands admitted and must be taken as true.

"Mrs. Vivier made no objections to the answer filed by the Retirement Board of the Municipal Employees' Annuity and Benefit Fund of Chicago. She did not raise in the trial court any question as to the character of the refund or that it was exempt from garnishment. The questions presented on this appeal were not raised in the trial court and are now being urged for the first time."

Namhera in the pleadings filed before the trial of this case or at any time during the course of the trial was the question raised as to the right of plaintiff to garnishee the funds in the possession of the garnishee belonging to Mrs. Vivier. Although the answer of the garnishee was filed July 10, 1935, stating that it had in its possession \$715.52 belonging to Mrs. Vivier and defendant is affidavit of merits was not filed until September 16, 1935, no question was raised therein by the defendant that the refund money in the hands of the garnishee belonging to Mrs. Vivier was exempt from garnishment. It is a settled rule of this court that a party will not be permitted to urge objections in a court of review which were not urged in the trial court. (Morey v. Brown. 305 III. 284.)

Assuming, however, that the question is properly before this court for review, were the funds in the hands of the garnishee belonging to defendant exempt from garnishment? Para. 795, sec.

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58, ch. 24, Illinois State Bar Stats., 1935, relating to the remarriage of the widow of a deceased member of the Municipal Employees'
Annuity and Benefit Fund is, in part, as follows:

"Notwithstanding the provisions of any other section or sections of this Act to the effect that any annuity for the widow of a municipal employee shall be a life annuity, any annuity which shall have been granted to a widow of a municipal employee under and by virtue of the provisions of this Act shall terminate when such widow shall marry and if any such widow who shall marry shall not have received, in form of annuity, an amount equal to that accumulated from the sums deducted from the salary of the municipal employee concerned and applied for the purpose of providing annuity for such widow, a sum equal to the difference between the amount accumulated from the sums deducted from the salary of the municipal employee concerned and applied for the purpose of providing annuity for such widow and the amount received by such widow in form of annuity shall be refunded to such widow." (Italics ours.)

It is readily apparent that para, 797 of ch. 24, heretofore quoted, dealing with the question of exemption from garnishment and attachment is not applicable to the situation presented here, since that section of the act only protects annuities, pensions and disability funds from garnishment and attachment, and the defendant in this case relinquished her status as an annuitant when she remarried. As long as she remained a widew, the statute protected the annuity which had been granted to her upon the death of her husband, not only from garnishment and attachment by her creditors but effectually prevented her as an annuitant from assigning or mortgaging in whole er part her interest in the annuity. The annuity payable to her as a widew ceased upon her remarriage. Her status as beneficiary was terminated. The only right or interest she had in the fund was to a refund, if such was due her, under para, 795. Any refund due her was her property. She could withdraw it, assign it or do with it as she saw fit. She was merely a creditor of the garnishee to the extent of the \$715.52 in its hands, which was clearly recoverable for plaintiff's use in part satisfaction of his principal judgment against defendant.

58, ch. 24, Illin is St to Bar State., 1935, relating to the remarriage of the widow of a deceased member of the aunisional ancioyees. Amounty and Benefit Fund is, in part, as follows:

"Notwitnstanding the provisions of any other sectior or sections of this Act to the effect that any ansuity for the widow of a municipal employee shall be a life annuity, any analty which shall have been granted to a widow of a manipal employee under and by virtue of the provisions of this act shall ter increase such widow shall marry at all any shall ter increase such widow shall marry at all any end widow and any analty shall committed from the same deducted from the same of the analty of the maricipal employee concerned and applied for the puriose of providir annuity secumulated from the sums equal to the difference between the amount secumulated from the eugs deducted from the same of the annuity and the amount received by such willow in or of annuity shall be relaided to such a show in our of

It is readily apparent they para. 75% or an. 24, coretaine quoted, dealing wit. the question of eresption iron garnisment and attacament is not ap-licable to the sit ation presented nere, since that section of the set only erects unsuites, pensions and lisebility funds from garaisament and attacoment, and the lefter and in this case ralinguished her status as an unouitant w. o. she remarried, As long as the remained a widow, the state protected the amulity den bustand red to make and nogu red of hetners need bad deidw only from garnishment and attacuasant by new oreditors but affectually provented her as an anaditant trom assigning or mortageing in whole or part her interest in the emulity. The abbutty payant to her as a widew ceased upon her remarriage. Gor status as beneficiary was terminated. The only right or interest she and in the fund was to s refund, if such was one her, under pars. 795. Any realnd due ner was her property. She could witnered it, assign it or do mit. it as she saw fit. sice was merely a creditor of the parelance to the extent of the \$715.52 in its hands, which was electrly recoverable for plaintiff's use in part satisfaction of his principal judgment against defendant. Plaintiff's motion of March 27, 1936, to dismiss this agreal was reserved to hearing. We have given careful consideration to the motion and find that it possesses merit, but in view of the fact that we have decided the appeal on its merits, said metion will be denied.

For the reasons indicated herein the judgment of the Municipal court against the garnishee for the use of plaintiff, John Wiedemeyer, is affirmed.

AFFIRMED.

Friend and Scanlan, JJ., concur.

Plaintiff's motion of ward 27, 1950, or fieries take some was reserved to hearing. We have given careful consideration to the motion and find that it possesses marit, but in view of the first transfer we have decided the appear or its white, sais writen the bedenied.

Bor the reasons indicated north see ja mer of the Municipal court against the gardisher for the age of pasartiff, John Wiedemeyor, is affirmed.

. WHIRMING

Friend and Jeanlan, J., . oncar.

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GEORGE F. BARRETT. Appellee,

JOSEPH FARINA. Jr., and YOLANDA FARINA.

Appellants.



APPEAL FROM SUPERIOR COURT. COOK COUNTY.

287 I.A. 628

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse an order entered by the superior court, March 5, 1936, approving the final report and account of the receiver of the property involved in this cause.

December 23, 1935, the receiver, L. G. Bergmann, filed her final report and account, to which Joseph Faring, Jr., and Yolanda Farina, his wife, defendants in this foreclosure proceeding, and the owners of the equity of redemption prior to the expiration of the period for redemption, filed the following objections:

The Receiver hereunder was appointed December 29, 1933. A decree was subsequently entered and thereafter, on May 11, 1934, the premises were sold by the Master in Chancery to the Complainant herein. The Complainant herein likewise took a judgment at law in the Superior Court of Cook County, case No. 588496, entitled 'M. C. Barrett -vs- Joseph Farina, et al., and thereafter an Execution was issued on said judgment at law, and the Sheriff of Cook County, Illinois, did levy upon the real estate not involved in this proceedings, and did sell said real estate by virtue of said Execution. The Execution was returned satisfied in full, and the judgment at law was satisfied in full; that the debt represented by said judgment at law in the Superior Court of Cook County Case No. 588496, entitled 'M. C. Berrett -vs- Joseph Farina, et al.' is one and the same debt arising out of the foreclosure herein, and the satisfaction of said debt in the law suit likewise satisfied the debt in this proceeding.

GEORGE F. BARRETT.

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JOSEPH FARINA, Jr., and YOLANDA FARINA, Appellants.

APP OL PROM BURGON OCU. , SOME TRANS.

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M. PR. IDING JULTIC DULIVAN

This appeal seeks to reverse an order entered by the superior court, March 5, 1936, a, reving the vinal report and account of the receiver of the acquivery involved in this cause.

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"1. The Receiver harounder was appointed December DF, 1933. A decree was subsequently entered and thereffer, on to the Complainant herein. The Complainant berein likewise took a judgment at law in the Superior Sourt of Cook Sounty, ose No. 588486, entitled 'M. C. Barret' -ve- Joseph P. rina, et al., and thereafter am Throution was issued on said judgment at law, and the shariff of book sounty, Illinois, Sti levy upon the real estate not involved in this proce dings, at did sell send estate by virtue which and included The Execution as returned astisfied in full, and the judgment at law and antisfied and the debt represented by said dudyment to law in in full: the Superior Court of Cook County Case no. 588496, ontitled TM. C. Berrett -ve- Joseph Farim, at al. te one and the same debt arising out of the foreclosure herein, and the satisfaction of seld debt in the law suit likewise seri fied the debt in this proceeding.

- "2. That the Receiver should have been discharged on the date of the sale and satisfaction of the judgment at law, viz; October 9, 1934, but that the said Receiver has been wrongfully collecting the rents after the entire debt had been satisfied and discharged of record.
- *3. That the Receiver did, on July 12, 1934, pay the sum of \$196.04 on account of the general taxes for the first half of the year 1932; pay the further sum of \$193.14 on account of the general taxes for the second half of the year 1932, and paid the further sum of \$226.50 on account of the balanace due on the 1930 taxes, which said sums were paid after a sale of the premises in this foreclosure proceedings, and the said payments were made contrary to law.
- "4. That the Receiver, subsequent to the sale of the premises herein, on April 29, 1935, made a capital improvement to the premises in the purchase of a refrigerator for the sum of \$87.50, which thereby enhanced and increased the value of the property, but that the said expenditure was unlawful and diverted the funds in the hands of the Receiver from these objectors, who are rightfully entitled thereto, to the use of the purchaser at the Master's Sale.
- *5. That the Receiver has unlawfully expended for said taxes and the purchase of the refrigerator after the sale of the premises herein by the Master, the sum of \$703.18, which sum should be ordered to be paid into this estate for the use and benefit of these objectors, who were the owners of the equity herein.
- *6. These objectors therefore pray the Court to enter an Order directing the Receiver herein and his sureties to pay the sum of \$703.18, or such sum as shall be found to have been unlawfully expended by said Receiver, into this estate, and the said money be paid to these objectors, as the owners of the equity of redemption."

the final report and account of the receiver, discharging her and relieving her surety of all liability on her bond, found inter alia that "pursuant to a general order of this court of entered October 16, 1933, said receiver" paid the first installment of the 1932 general real estate taxes amounting to \$196.04, the second installment of the 1932 taxes amounting to \$193.40, and the balance of the 1930 taxes, amounting to \$226.60; that such payments were made after sale and during the redemption period; that there was in full force and effect the general order above mentioned, which was entered by the executive committee of the superior court October 16, 1933, and directed all receivers

- *2. That the Receiver should have be a ciucharged on the date of the sale and stisfection of the jurgment at law, vis; Cotober 9, 1934, but that the said Receiver has been wrongfully collecting the reats after the ontine debt had been estisfed and discharged of recore.
- *3. That the Receiver did, on July 12, 1974, pay the swa of \$196.04 on account of the general takes for the first half of the year 1932; pay the further awa of \$19.16 on account of the general takes for the second half of the year 1952, and paid the further am of 2 6.50 on account of the balance due on the 1950 takes, which said summ were poid after a sale of the premises in this forcolosure processing, and the said payments were made contrary to law.
 - "4. That the Receiver, Josephent to the cale of the premises herein, on April 29, 1905, made a compital improvement to the premises in the purchase of a refrigerator for the sum of \$69.50, which thereby enhanced and increased the value of the property, but that the said expenditure was unineful and diverted the funds in the hands of the kectiver from these edjectors, who are rightfully entitled thereto, to the use of the purchaser at the Master's Jale.
- "5. That the Roceiver has unlastilly expended for said taxes and the purchase of the refrigerator after the sale of the premises herein by the Master, the saa f '705.13, abide sum should be ordered to be paid into this eatent for the use and benefit of these objectors, who well the camerof the equity herein.
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The trial court in its order of March 5, 1936, operwing the final report and account of the we iver, dischar ing her and relieving her surety of all limitify on her bone, found inter alia that "pursuant to a general order of this court with the first instally on the first install on the first instally on the first installed on the first install on th

inter alia that "pursuant to a general order of this court and thered October 16, 1935, said requiver" paid the tiret installment of the 1932 general real estate taxes amounting to \$190.04, and the balance of the 1930 taxes amounting to \$226.60; that and the balance of the 1930 taxes amounting to \$226.60; that and payments were made after sale and during the redemption

period; that there was in full force and offect the general erfer above mentioned, which was entered by the executive committee of the superior court October 16, 1933, and directed all restirers

of that court to pay 75% of the net income from the property under their control as taxes; that "said payments on account of general real estate taxes so made, pursuant to said order, were proper expenditures of the receiver;" and that the purchase of a refrigerator for \$87.50 by the receiver after sale and during the redemption period was a proper expenditure "for the purpose of keeping the premises in a rentable condition" and was properly charged against income from said premises.

Defendants contend that the receiver had no right to pay taxes on the premises after sale and during the redemption period; that the receiver had no right to make a capital investment for the improvement of the property during the redemption period by purchasing the refrigerator; that the deficiency decree entered in this cause had been satisfied by a levy on other property; and that these defendants were entitled to receive the net rents during the redemption period, including the amounts expended by the receiver in payment of the aforesaid taxes and the purchase of the refrigerator.

In the brief filed by the law firm of Barrett, Barrett, Costello & Barrett, as attorneys for "appellee" under "appellee's" theory, we find the following:

- "George F. Barrett, as sole appellee, contends that the judgment and order entered below should be affirmed on the following grounds:
- *1. That the receiver, L. G. Bergmann, is the only person against whom any relief is asked, and is a necessary party to this appeal.
- "2. That the sole relief asked in this court is the reversal of the order entered on March 5, 1936, approving the Final Report and Account of the receiver, and the payment of the general taxes, and that the receiver be ordered to pay over to the appellants said monies so paid out; that in the absence of said L. G. Bergmann, receiver, as a party to this appeal, this Court is without jurisdiction, power or authority to grant said relief, or any relief, on this record.

of that court to pay '15% of the net income from the property under their control as taxed; that "arid payments on account of general real outate taxes so made, around to take order, were proper expenditures of the receiver;" and that the purchase of a refrigerator for \$67.50 by the receiver after eale and during the redemption period was a proper expenditure "for the purpose of keeping the premises in a rentally condition" and was properly charged against income from said premises.

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Defendants contend the tile receiver had no right to pay taxes on the premises after s.l. and during the redemption period; that the receiver had no right to make a capital investment for the improvement of the property during the relamition period by purchasing the refrigerator; that the deficiency decree entered in this cause had been satisfied by a levy on other property; and that these defendants were entitled to receive the act remts during the redemption period, including the ansunts expended by the redemption period, including the ansunts expended by the refrigerator.

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[&]quot;2. That the sole relief asked in this court is the reversal of the order entered on hereh 5, 1936, approving the Final Report and Account et the receiver, and the payment of the general taxes, and that the receiver be ordered to pay ever to the appellants said monies so paid out; that in the absence of said L. G. Bergmann, receiver, as a party to this appeals this Court is without jurisdiction, power or suthority to grant said relief, or any relief, on this recend.

- "3. That appellants' abstract is entirely insufficient to present the grounds relied upon for a reversal, and in the absence of a certificate of evidence, this Court will presume that the action of the Chancellor was proper.
- "4. That the taxes were paid by the receiver under an order of Court, and there is nothing in the record presented to this court to show, either that the deficiency judgment was satisfied or that the appellants were the owners of the equity of redemption.
- *5. That the receiver is fully protected by the order of Court and cannot be held personally responsible for the repayment of the taxes.*

Even a casual examination of the record is convincing that the first three of the above enumerated grounds are frivolous. George F. Barrett, plaintiff in the foreclosure proceeding, purchaser at the master's sale of the property involved, and the recipient of the master's deed to this property upon the expiration of the redemption period, was and is a member of the above mentioned law firm, which represented the receiver in the presentation of her final report and account and in the preparation and presentation of the order approving said report and account. George F. Barrett, as the plaintiff in the foreclosure proceeding, had no direct interest in the issues raised by the objections to the receiver's final account. His rights in the foreclosure proceeding had long since been fully adjudicated and his only apparent interest in the order appealed from was as one of the attorneys for the receiver. The notice served on the Barrett law firm of the notice of appeal specifically stated that the appeal was taken from the order overruling defendants! objections to the final report and account of the receiver and approving such final report and account. How can it be seriously urged that George F. Barrett is an appelles in this proceeding? The Civil Practice act provides that "notice of appeal" may be served on the attorney of record for the appellee, as well as on the appellee personally. The Barrett law firm, as attorneys for the receiver, the only appellee in this case, was served with a copy of the notice of

"3. That appellants' abstract is entirely insufficient to present the grounds relied upon for a reversel, and in the absence of a certificate of evidence, this leart will presume that the action of the Chancellor was proper.

"4. That the texes were paid by the receiver under an order of Court, and there is nothing in the receid presented to this court to show, either that the deficiency judgment was satisfied or that the appellants ere the oners of the equity of redemption.

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appellee in this case, was served with a copy of the notice of

appeal. The only possible pretext for George F. Barrett characterizing himself as an or the "only" appellee before this court is that
the word "appellee" inadvertently appears under his name in the
title of the cause on the notice of appeal. It is idle to urge that
there is or could be any other appellee on the issues presented to
this court by this appeal than the receiver. The Barrett law firm
represented the receiver in the trial court and it represents the
receiver here and the receiver only.

In the third ground, above stated, reference is made to the absence of a certificate of evidence from the record and it is urged that because of such absence this court must presume that the order appealed from was properly entered. This point is urged in spite of the fact that the order itself is silent as to the presentation of any evidence and contains the following recital:

*This cause coming on to be heard upon motion of L. G.
Bergman, receiver herein, and upon said receiver's Final Report
and Account heretofore filed herein, and upon objections to said
Final Report and Account of Joseph Farina, Jr., and Yolanda Farina,
his wife, by their attorneys, Abrams, Sherman and Lewis and
Alexander H. Glick, it appearing to the court that due notice hereof
has been served upon all of the attorneys of record herein, and the
court having examined and considered said Final Report and Account
and having heard the arguments of counsel relative thereto, and
being fully-advised in the premises, finds: * * **

It is fair to assume from this recital that no evidence was presented to the chancellor and counsel for appellee must have known that such was the fact when appellee's brief was written. Therefore, it was improper for counsel for appellee to repeatedly attempt by the language used in her brief to convey the impression or to suggest the inference that evidence was presented at the hearing on defendants' objections to the approval of the receiver's final account, which was not included in the record filed in this court.

The principal question presented for our determination is whether the receiver had the right to pay taxes during the redemption

appeal. The only possible prefert for G.org, F. B.rustt characterising himself as an or the "only" appellee b four this court in that the word "appellee" inserventently expears under his name in the title of the cause on the netice of appeal. It is idle to urge that there is or could be any other appellee on the issues presented this appeal than the receiver. The Barrett law firm represented the receiver in the trial court and it represents the receiver here and the receiver only.

In the third ground, above at ted, reference is made to the absence of a certificate of evidence from the record and it is urged that because of such absence this court must procume that the original appealed from was properly entered. This point is urged in spite of the fact that the order itself is cilent as to the presentation of any evidence and contains the fellowing restants.

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The principal question prosented for our determination is whether the receiver had the right to pay taxes furing the redemption

period and whether she had the right to rely for protection in making such payments upon the blanket order entered October 16, 1933, by the executive committee of the superior court which directed receivers of that court to pay taxes.

It has been uniformly held by the courts of review of this state that a receiver has no right to pay taxes after sale and during the redemption period. In Stevens v. Hadfield, 196 Ill. 253, the court said at p. 256:

"We said in <u>Davis</u> v. <u>Dale</u>, 150 Ill. 239: 'The owner of the equity of redemption was entitled to receive the rents thereof after the sale and until the time of redemption expired;' and in <u>Stevens</u> v. <u>Hadfield</u>, <u>supra</u>: 'Eggleston, the purchaser at foreclosure sale, had no claim to these rents by virtue of his purchase.' In other words, the receiver held the money received as rents and profits for the holder of the equity of redemption, subject only to the payment of such proper charges against it as might be allowed by the court, and not in any sense, for the benefit of the purchaser at the foreclosure sale."

To the same effect are <u>Bothman</u> v. <u>Lindstrom</u>, 221 Ill. App. 262; <u>Wolf v. Fischman</u>, 273 Ill. App. 237; <u>Builder's Bond & Wig. Co.</u> v. <u>Bickley</u>, 274 Ill. App. 638.

The receiver states in her brief that "she does not find it necessary to invoke any denial" of the rule as above stated and approved by the cases cited, but insists that inasmuch as she paid the taxes under the general order of the executive committee of the superior court she cannot be held personally responsible and be compelled to repay moneys so applied by her to the payment of said general real estate taxes. The receiver then goes on in her brief to advance the following reasons why the rule prohibiting a receiver from paying taxes after sale out of the income from the property is not applicable to her.

"First: The appellants do not show that they were owners of the equity of redemption, and as such entitled to the rents collected by the receiver.

"Second: They do not show that the deficiency judgment was paid.

pariod and settler she had the right to rel, for setuntion in making such payments upon the blanket order with the better 16, 18, 233, by the executive committee of the superior court dich directed red ivers of that down! To pay takes.

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"First: The appellants do not show that they were owners of the equity of redemption, and as such smithed to the rents collected by the receiver.

"Second: They do not show that the deficiency jud ment

Third: The record does not show the terms of the trust deed which was foreclosed.

"Fourth: The receiver were."

The above reasons are so obviously lacking in force that they merit little, if any, consideration. As owners of the equity of redemption the Farinas were made defendants in the foreclosure proceedings, and the truth of the allegations contained in their written objections to the receiver's final account that they were the former owners of such equity and that the deficiency judgment had been paid, not having been denied or questioned in the trial court, cannot be questioned for the first time on appeal. Why the record should show the terms of the trust deed, which was foreclosed, as having any bearing upon the matter new before us, we are at a loss to understand. We will have to assume that the order appointing the receiver was in all respects lawful and did not direct her to perform an unlawful act.

Counsel for the receiver did not secure a specific order in this cause prior to her payment of the taxes after sale and during the redemption period authorizing her to pay such taxes, but claim that she relied entirely on the general order of the executive committee of the superior court as her authority. Mid that general order authorize the payment of the taxes in question and afford the receiver protection against having her final account surcharged to the extent of the taxes so paid?

In view of the long and well established rule of law that a receiver cannot pay taxes after sale and during the redemption period, could it possibly have been within the contemplation of the executive committee of the superior court that this general order was a direction to receivers of that court to pay taxes after sale? We think not. Any direction to that effect was

Third: The record ose not show the terms of the truct deed which was foreclosed.

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The record don and show wint the take of "FOREth: the order ppointing the rectiver were." The above reasons are so obviou 1. lacking in force that they merit little, if any, consider then. 's owners of the early of redemption the Farinas were reads defendents in the inreclosure proceedings, and the truth of the allegations contained in their written objections to the receiver's finel account that they were the former owners of such country and that the deficiency judgment had been paid, not havin been denied or guestioned in the trial court, cannot be questioned for the first time on appeal. why the record should show the terms of the trust deed, which was foreclosed, as heving any bering upon the metter new bateres, order appointing the receiver was in the respects hawful and did . Jos fulwalm: as man crow of real toorib ton

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clearly null and void. In our opinion the executive committee of the superior court, by reason of the emergency then existing, intended by its general order to direct the receivers of that court to do what it could legally direct them to do and that was to pay taxes prior to the foreclosure sale. Regardless of how comprehensive the terms of the general order appear to be, counsel for the receiver must have known that the executive committee of the superior court could not extend the application of its order beyond the sale and through the redemption period in abrogation of the established law of the state.

In Bothman v. Lindstrom, supra, an order was entered by the chanceller authorizing and directing the receiver to pay current taxes and special assessments due on the property involved and to redeem same from a tax sale of December 8, 1916, as soon as sufficient funds were in the hands of the receiver to enable him to do so. The receiver redeemed from the tax sale, paid the general taxes for 1916 and the second installment of the special assessment mentioned. A decree of foreclosure and sale was entered, the property sold December 31, 1917, and a deficiency decree for \$1,000 entered against the mortgagors. Sometime during April, 1918, the receiver paid the general taxes for 1917, amounting to \$344.54 and the third installment of the special assessment, amounting to \$63.55. In considering the right and authority of the receiver to make the latter payments after the master's sale and during the redemption period, the court said at pp. 265-66:

"It is contended on behalf of the receiver that the court erred in refusing to give him credit for the general taxes for 1917 and for the third instalment of the special assessment, both paid by him in April, 1918, and in support of this it is argued that this payment was authorized by the order of court of August 7, 1917, from which we have quoted. Of course, it is the law that a receiver, who is an officer of the court, is subject to its orders, and if all parties are properly notified of the application for the order and the receiver is directed to make

electly null and void. In our opinion the enterive condities of the superior court, by reason of the energyncy then existing, intended by its general order to direct the receivers of that court to do what it could legally direct them to do end that was to pay taxes prior to the foreclosure sale. Regardless of how comprehensive the terms of the general order appear to be, counsel for the receiver must have known that the executive committee of the superior court could not extend the appliestion of its order beyond the sale and through the redemption period in abrogation of the established law of the state.

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In Bothmen v. Lindstrom, supra, an order was entered by the chancellur authoriding and discting the roceiver to pay current taxes and special as carments due on the property involved " and to redeem same from a tax sale of becomber 8, 1916, as moon as sufficient funds were in the hands of the receiver to enable him . 08 05 05 " The reactiver redermed from the test, le, paid that general taxes for 1916 and the second installment of the special assessment montioned. . bear in decrease as a second manufacture of the second manufacture of th entered, the property sold Lectaber 31, 1917, and a deficiency decree for \$1,000 entered against the mostgagors. Jonethme during April, 1918, the reactiver paid the general total for 1917, smounting to \$344.54 and the third installment of the special assestment, smounting to \$63.55. In considering the right and sutherity to he but al . . 'Talasm ont tothe studence Tottel out amout reviser' during the redemption paried, the court said at p. 265-66:

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payments, and no question is raised by any one in interest that such payments are improper, the receiver can rely upon the order of court. He must obey the order of court and obviously should not be penalized in these circumstances. Reardon v. Youngquist, 189 Ill. App. 3. But we think it also clear that the order entered was not sufficiently specific to authorize payment of the taxes and the instalment of the special assessment in 1918. We are of the opinion, upon an examination of the petition filed by the receiver and the order of court, that these payments were not in contemplation of the court when the order was entered, so that the receiver cannot rely upon such order."

But it is urged that the real custody of the funds in any receiver's hands is in the court and not with the receiver. That a receiver must obey the orders of the court and that expenditures made pursuant to such orders cannot be questioned on the receiver's accounting. It is also pointed out that the receiver's obedience to the order of the court is his sufficient protection and that this is true even if the order is erroneous and is subsequently reversed. (Reardon v. Youngquist, 189 Ill. App. 3.) The aforesaid general order either could not have been intended to apply to the payment of taxes by a receiver after sale or if it was so intended. it was null and void. Such is not the kind of an order that will protect a receiver from having her final account surcharged to the extent of the taxes illegally paid or that will estop the defendants from complaining of such illegal payments. When the receiver considered making the tax payments in question it was clearly her duty and the duty of her attorneys to make application in this cause upon notice for specific authority to make them. In our opinion in so far as the payment of taxes after sale by a receiver is involved it is only an order entered upon such an application, after notice to all parties concerned, where an opportunity is given to show the court why such order should not or could not legally be entered that affords protection to a receiver.

It will be noted that in Bothman v. Lindstrom, supra, the court, in discussing this question, said: "Of course, it is the

payments, and no question is raised by any one in interest discussion payments are improper, the receiver ear rely upon the erect of court. He mast obey the order of court and coverently should not be penalized in these circumsts dest destroom v. jourguist. 189 Ill. App. 3. But we think it also clear that the order entered was not sufficiently specific to authorize payment of the terms and the inotalment of the special assessment in 1916. We are of the opinion, upon a scenin sion of the patition filed by the receiver and the order of court, that here payments are interest one in contemplation of the court of the order of court that here payments are that the receiver cancer tally upon and order.

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law that a receiver, who is an officer of the court, is subject to its orders, and if all parties are properly notified of the application for the order and the receiver is directed to make payments, and no question is raised by any one in interest that such payments are improper, the receiver can rely upon the order of the court.

In Reardon v. Youngquist, supra, where the receiver's final account was approved, in passing upon the instant question, the court used this language at p. 13:

"Having had notice of the various petitions of the receiver for direction and authority to pay the various items now objected to, they are chargeable with notice of the orders entered. It was clearly the duty of appellees, if they desired to oppose the payment of those various items by the receiver out of the funds in his hands, to have opposed the entry of the order by showing to the court why it should not or could not legally be entered, or at least to have sought its vacation on motion and a showing. Failing in this they should have notified the receiver that they would hold him responsible for a misapplication of the funds, if he obeyed the order."

We are impelled to hold that the receiver had no authority to pay the taxes in question; that her payment of such taxes after sale and approval of sale and during the redemption period was in violation of the established law of this state; and that the general order entered by the executive committee of the superior court October 16, 1933, directing that 75% of the net rents collected by receivers of that court should be applied to the payment of taxes, could only have been intended to apply during the period of foreclosure and until the property was sold.

It is contended that the purchase of the refrigerator by the receiver April 29, 1935, was a capital investment and that the receiver had no right to make any such investment during the period of redemption. However, the court found in its order "that the acquisition of said refrigerator was meessary for the purpose of keeping the premises in a rentable condition." It is a matter of common knowledge that refrigerators are necessary equipment in

law that a receiver, who is an officer of the court, is "abject to its orders, and if all parties are properly notified of the application for the order and the procedure is directed to make payments, and no question is raised by eary one in interest that such payments are improper, the receiver orn rely upon the order of the court."

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modern apartments and no convincing reason has been shown why the finding of the chancellor in this respect should be disturbed.

of the superior court approving the final report and account of the receiver as to the general real estate taxes paid by her on the property involved herein for the years 1930 and 1932 is reversed and the cause remanded with directions to sustain the objections of the defendants, Joseph Farina, Jr., and Yolanda Farina, to said portion of the final account of the receiver wherein she credits herself with the amounts paid by her for such taxes and to order the receiver to pay to defendants \$616.78, the amount wrongfully paid by the receiver for taxes during the redemption period, as set forth in her final account. In all other respects the order of the superior court is affirmed.

ORDER AFFIRMED IN PART AND REVERSED IN PART AND CAUSE REMANDED WITH DIRECTIONS.

Friend and Scanlan, JJ., conour.

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For the superior court approving the final report and shows of the superior court approving the final report and business and be not enthe property involved havein for the grand like order and the couse remanded with directions to wouldnesh objections of the defendants. For phereins, to said portion of the fileal count of the massiver wherein she credits herself with the count paid by her for such toxes and to order the resident to from a felt the mount wrongfully poid by the resident for takes during the redemption period, as set worth in her final account.

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ORDER DE L'URGE IN 2007 AU AU ALVARRAD IN PART AND CLUVE LEMELO E AITH DISSULTIONS.

Triend and Scanlan, JJ., concur.

38911

INTERNATIONAL FILTER CO., a corporation,

Appellant,

T.

ALLIED CONTRACTORS, INC., a corporation,

Appellee.

appeal from circuit court, cook county.

287 I.A. 628

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an action for damages for breach of a written contract brought by plaintiff, International Filter Company, against Allied Contractors, Inc., defendant. The court tried the case without a jury, and, after finding the issues in favor of plaintiff, entered judgment February 18, 1936, against defendant for nominal damages of \$10 and costs. This appeal seeks to reverse the judgment in so far as it limited and restricted the damages recoverable by plaintiff to such nominal sum of \$10. No question is raised on the pleadings.

Defendant filed pleas raising issues of fraud and public policy but introduced no evidence in support thereof. At the close of plaintiff's case defendant moved that the trial court find the issues in plaintiff's favor and assess merely nominal damages against defendant. In response to such motion the above finding and judgment were rendered.

May 23, 1927, the parties entered into the following written contract: "In consideration of the International Filter Co. furnishing the undersigned with proposal for filter equipment for Glenoce, Illinois, it is hereby agreed that the undersigned

INTERNATIONAL FILTE. CO.,

a corporation,

v.

ALLIED CONTRACTORS, IMC.,

a corporation,

appellee.

MK. PRU I IN JUNCIO UNITELLI DILLVEUD IN OPTHION OF THE UCU.

This is an action for dead gos for the of a litter contract brought by plaintiff, Intermitional Dilt r tempuny, against Allied Contractors, Inc., defendent. The court tried the case without a jury, and, after limiting the issues in favor of plaintiff, entered judgment Jebruary 1, 1956, against defendant for nominal damages of \$10 and costs. This appeal seeks to reverse the judgment in so far as it limited and we stricted the damages recoverable by whether i we will nowinal stricted the damages recoverable by whether i we will nowinal stricted the damages recoverable by whether i we rust nowinal

Defendant filed plead I: i.in-is uce of froud and public policy but introduced no evidence in surport the recof. It the close of plaintiff's case defendent moved that the trial court find the issues in plaintiff's flavor and a case or IV nominal damages against defendant. In response to such motion the

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will use said figures in proposal and if awarded the contract will place this business with the International Filter Co. at the prices named below.

"All materials and labor covered by Section 'E' of the Glencee filtration specifications for the sum of Thirty Four Thousand Six Hundred Eighty (\$34,680) Dellars. Delivered and erected, not including any financing charges for engineering, selling of certificates, or interest on certificates."

It will be noted from the terms of the contract that defendant agreed, if it was awarded the contract by the Village of Glencoe for the installation of the filter equipment, that plaintiff as defendant's subcontractor was to furnish "all materials and labor covered by section 'E' of the Glencoe filtration specifications" at the aggregate price of \$34,680. Defendant was awarded the contract by the village of Glencoe and it is conceded that it refused to permit plaintiff to perform the portion of the work stipulated in the above subcontract. Therefore, the only questions presented for our determination are the proper measure of the damages plaintiff is entitled to recover and the evidence necessary and competent to establish the amount of such damages.

Plaintiff's theory is (1) that defendant's breach of the contract entitled it to recover as substantial damages therefor the amount of the contract price less what it would have cost plaintiff to complete performance according to the terms of the contract; (2) that such cost of performance is properly proved by evidence as to the probable cost of the various items necessary to complete said performance; (3) that such probable cost may be established by the detailed calculations of an expert witness familiar with the fair and usual cost of such items; (4) that such detailed calculations prepared and reduced to writing at the time

will use seid figure. in opo lon is more the factor to will place this busines in the international internation of the prices nemed below.

"All materials on the severed by the to the design of Thousand Six Muncred bighty (.34,630) sold rs. Indivoved the erected, not including may the cold of the selling of certificates, or interest of an elling of certificates, or interest of a selling of certificates."

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Flaintiff's theory is 1) that do reduced to the of the contract entitled it to recover so a bornatial consequential consequential the amount of the contract price is the the terms of the complete performance associant to the terms of the contract; (2) that such cost of personance is passed, proved by evidence as to the probable doubt of the various if man may be to complete said performance; (3) that such probable countries of a such probable of the truch probable of many be established by the detailed or that though of the fair and usual do t of and it may (4) that such detailed calculations propers and should be of the the the term of the order of the said that the fair and usual do t of and it may (4) that such detailed calculations propers and should be of the the the the the the order.

competent to establish the second of uch date of

on work sheets may be read upon the trial by plaintiff's expert witness after a proper foundation has been laid; (5) that such work sheets are themselves competent evidence of the estimated cost of performance; and (6) that such proof of plaintiff's damages need not be to a degree of absolute certainty but only to a degree of reasonable approximation.

Plaintiff contends (1) that the trial court erroneously limited its recovery to nominal damages instead of assessing its damages in an amount that represented the difference between the contract price and what it would have cost plaintiff to perform the subcontract; and (2) that the trial court erroneously restricted it in its proof of damages by refusing to permit its witness to read from plaintiff's exhibits D and E for identification after a proper foundation had been laid and in refusing to admit in evidence said exhibits D and E.

Defendant's theory is that there was no legal proof of any actual damage to plaintiff and that the court did not err in awarding plaintiff only nominal damages, and in support of such theory it is urged that plaintiff failed to establish by competent evidence what it would have cost it to perform the subcontract; that the evidence before the court on behalf of plaintiff warranted only the assessment of nominal damages; that the court properly refused to receive in evidence plaintiff's exhibits D and E for identification (hereinafter for convenience referred to simply as exhibits D and E) upon the foundation then laid; that no ruling of the court was asked by plaintiff to permit its witness to read from plaintiff's exhibits D and E; and that as much force and effect should be given to a finding of the court as to the verdict of a jury.

That the proper measure of damages in this cause is the difference between the contract price of \$34,680 and what it would

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Plaintiff centends '1) that the trial pours remeasing the its recovery to nominal demages instant of essential in its familiary to nominal demages in an essent that represented the difference but an the contract price and what it ould have cost plain in so personal the subcontract; and (2) that the trial round spract of demages by remained to pradict its summer so recovered plaintiff's subiblies a and a for identities sign of the aropar coundation had seen laid and in refusant so smith its million and the substitution had seen laid and in refusant so smith its and files.

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have cost plaintiff to have done and completed the work according to the terms of the contract is not disputed, but defendant claims that plaintiff did not prove any damages under such measure by competent and relevant evidence.

As heretofore shown, the subcentract in question was entered into May 23, 1927, and the principal contract was awarded to defendant by the Village of Glencoe May 27, 1927. Plaintiff was ready, willing and able and offered to furnish the materials and labor as agreed, but according to defendant's second amended plea, filed June 12, 1934, it notified plaintiff shortly after May 25, 1927, "that the defendant refused to purchase any equipment or material or work or labor or services or other things whatsoever from the plaintiff and the defendant at no time received any material equipment, work, labor, services or any other thing whatsoever from the plaintiff." Thus, defendant's breach of its contract with plaintiff was practically contemporaneous with its execution.

Preston F. Pew testified in behalf of plaintiff that he was manager of the municipal division of the International Filter Company; that he was associated with said company when the subcontract with defendant was entered into, and had been with plaintiff for thirteen years at the time of the trial; that he was first employed by plaintiff as purchasing agent, in charge of the purchase of all materials and supplies going into the construction of filters and filter equipment and that it was also part of his duties to prepare estimates for bids on filter equipment for municipalities; that about six months after said employment he was placed in charge of construction work consisting of the installation of filter equipment, particularly municipal plants; that about two or three years later he was promoted to the position of manager of the municipal division, in charge of sales

have dost plaintiff to have one and completed the work recoming to the terms of the centractis not dispute, but no not love any damages rue r ruen measure by competent and relevant ovidence.

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As heretofore shown, the subcentract in userion as matered into May 23, 1927, and the principal contract to average on the principal contract to average and by the Village of Clencor May 27, 1927, Flaintff was ready, willing and able and offerce to intilab the additional reads and least agreed, but according to delevient's second amended day, filed June 12, 1934, it notified plotabilit shortly after May 25, 1927, "that the defendant refused to purchase any continuent or aftituder work or labor or services or other things shatsoiver from the plaintiff and the defendant of no time received any material entire ment, work, leber, services or my other thing whatsoiver from the ment, work, leber, services or my other thing who toosy a from the plaintiff." Thus, defendent's breach of its confront afth plaintiff.

Preston F. Pew Lestiffer in behalf or plaintiff the the were anager of the municipal division of the international lifter Company; hat he was apsociated with said company when the subcontract with effendant was entered in o, and had been with plaintiff for thirthern ears at the time of the trial; that he was lift the analoge by plaintiff a purchasing agent, in drange of two purchase of all metricles on applies going into the conscruction of illter, and lifter emignent in that it was also part of his dutie, to proper asimates or of a thitter equipment for municipalitie; that Louisix muchased in an ge of come, now one or as a ting of the installation of lifter equipment, a visual off contains that about two or three years of the visual of the manager of the municipal time of the manager of the municipal time of the manager of the municipal division, in an age of all contains and age of contains and age of the manager of the municipal division, in an age of all contains and age of the municipal division, in an age of all contains and age of the municipal division, in an age of all contains and age of the municipal division, in an age of the position of manager of the municipal division, in an age of the contains and the company and the contains an

as well as construction and purchase of all equipment; that on May 23, 1927, and immediately prior thereto, he was in charge of the sales and construction of all municipal purification plants for plaintiff; and that plaintiff's subcontract price with defendant was set at \$34,680 as a result of his personal estimate of the elements included therein.

Plaintiff's exhibit D was marked for identification, and that portion of same which is pertinent here is as follows:

| | *Glencoe, | 11 | l. | 5/23/27. |
|------------|-----------|----|----|------------------|
| Equipment | | | | \$23,159 |
| Erection | | | | 3,938 |
| Hauling | | | | 400 |
| Extra fits | 1 | | | 100 |
| 3% | | | | 828 |
| | | | | 28,425 |
| | | + | 22 | 6,255. |
| | ~iq | | | 6,255 34,680. |

Pew testified further that he prepared exhibit D on the date it bears and that the figures thereon furnished the basis for plain-tiff's contract with defendant. The witness was permitted to refresh his recollection by examining the exhibit and to testify as to the items appearing thereon and that the figure \$6,255 opposite +22 represented the estimated profit on the job.

Plaintiff's exhibit E consists of sixteen pages of cost sheets, upon which are entries of detailed items from which were compiled the cost of the equipment and erection necessary for plaintiff's performance of its subcontract as shown on exhibit D. Pew testified that he personally prepared the first of these sheets showing the cost of the various items of equipment that went to make up the total estimated equipment cost of \$23,159, and that he compiled that sheet from other detailed sheets of exhibit E, which had been prepared and reduced to writing, either by himself or by plaintiff's estimator, now deceased, under his direct supervision, and that he personally checked each entry made by said estimator, finding the

no tent (thempia e ale to esaferue bas noticurtanos as liew as May 23, 1927, and immediately prior thereto, he was in charge of stantq meit office Ligitima ILs to motteusteno ban coler ad or plaintiff; and that plaintiff's subcontract price with defendnt was set at \$34,680 as a result of his personal callente of

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Plaintiff's exhibit D was marked for identification, and terrolled as at orest tuenitred by wolder ower to me tollower

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Paintiff's capital a consists to attack this to the page of the page of the transfer of the tr heets, upon which are entries of detailed it me from which were -miniq not greatern no town and encetten no season of belique ... Jillie performance of its subscontract as shown and chille. ... etines susua to durit ent borngerg tilenoring of that belittee nowing the cost the verious it may be equipment that to see always

the total estimated equipment sort of 23,159, and that he compiled hat sheet from other dotailed wheets of exhibit ", which had been repared and reduced to writing, either by him all or by plaintiff 's stimater, now deceased, under his direct supervision, and that he

ersonally checked each entry made by usid estimator, linding the

same true and correct.

After the witness had stated that he could not testify from memory as to the various entries on the sheets comprising exhibit E that went to make up the total cost of equipment, erection, hauling, etc., appearing on exhibit D but that he could so testify by referring to the figures on the exhibit, he was then asked to refresh his recollection and to testify as to the items therein contained.

Pew obviously read from the first page exhibit E, the following items as making up the total cost of equipment as shown on exhibit D: "The underdrain systems for the filters, \$1,184; sand 143 toms, \$651; the gravel, 114 tons, \$673; the wash troughs, castiron and supports, \$1,056; 4, 8 inch controllers at \$337.50 each, \$1,350; 4 operating tables at \$216, \$864; * * *. 4 loss of head and rate of flow indicating gauges, \$960; pipes and fittings, joints and supports, \$8,001; hydraulic filter valves, \$2,281; gate valves, \$2,025; check valves, \$315; small piping, priming, et cetera,\$200; 2 chemical feeders, screw type, \$600; chemical piping, \$50; one Clearwell depth gauge, indicating, \$75; one Clearwell depth gauge, recording, \$75; wash water gauge, mercury column, \$60; vacuum and pressure gauges in pump room, \$106; gasoline tank and supply line, \$100; one mechanical agitator, \$510; one Chlorinator, \$1,230; one 3 inch meter (Hersey), \$85; 2, 3 inch altitude valves, Gold and Anderson, \$334; laboratory equipment, \$374; total \$23,159.*

Defendant's counsel interposed the objection that the witness was reading from the exhibit. The trial judge then stated:
"Now, it is obvious that his testimony as to the items of equipment that he has not refreshed his memory and testified from his memory after refreshing it from the memorandum, but that he is reading them item by item."

The witness stated that as to the entries of the numerous

sime true and correct.

After the witness had thed the doubt not beatify.

From memory as to the verious antries on the charts comprising substitute is that the make up the total so that a signess, error, appearing an exhibit, has that an ability by referring to the figures on the salibit, he was then asked to refuse the recollection and to testify as to the items therefore out the testify as to the items therefore out the testify as the items the items the items the testify as the items the

Pew obviously read from the fires page exhibit N, the followng items as meking up the tetal coat of equipment a shown on exhibit
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651; the gravel, 114 tems, 1673; the assh aroughe, costiron and
upports, \$1,056; 4, 8 inch contachlers at 357.50 e.ch, 1,350;

operating tables at \$216; \$864; % % * 4 losa of lend and rate

i flow indicating gauges, \$260; pipes and littings, joints and
upports, \$8,001; hydraulic filter velves, '2,281; gate velves,

2,025; check valves, '315; small piping, priming, et cetera, \$20;

chemical feeders, sores type, '600; casadorl piping, of cetera, \$20;

chemical feeders, sores type, '600; casadorl piping, 57; one

chemical depth gauge, indicating, 75; one Clearwell depth gauge,

certing, \$75; wash water gauge, mercury oclumn, '660; vacuum and

ach meter (Hersey), \$65; 2, 5 inch littude valve:, Sold and aderson, \$334; laboxatory equipment, 8374; total [28,158,"

Defendant's commed interposed the objection that the lite sessing from the exhibit. The trial judge then that that his testimony as to the item. of equipment hat he has not refreshed his memory and testified from his manery. Ther refreshing it from the memory name, but that he is resting

ressure gauges in pump room, \$100; gasoline tank and supply line,

nem item by item."

The witness stated that as to the antries of the numerous

items and their costs on exhibit E that "I will say that I can't give them from memory nor can I study them and remember them, but I can read them off." The witness was not permitted to read from the exhibit the balance of the entries thereon.

Plaintiff then offered in evidence exhibits D and E and defendant's objection to the introduction of same was sustained.

As heretofore stated this action was brought to recover from defendant \$6,255, which was the difference between \$34,680. the contract price, and \$28,425, which it would have cost plaintiff to have done and completed the work according to the terms of the contract. Defendant, about to bid for the principal contract for the installation of the filtration plant by the Village of Glencoe. procured plaintiff to prepare and submit an estimate of the cost of installing section E of such plant. On May 18, 19 and 20, 1927, the witness, Pew, who by his testimony unquestionably qualified himself as an expert in the installation of filtration systems, along with plaintiff's estimator, now deceased, who worked under Pew's direct supervision, prepared detailed estimate or cost sheets covering sixteen pages and enumerating about four hundred items necessary to the installation of said section E. After checking the items prepared and entered by the estimator as to their fairness and correctness. Pew prepared exhibit D on the morning of May 23, 1927, showing plaintiff's profit on the job in addition to the total cost of the elements necessary for the completion of the work. That same afternoon, the defendant accepted plaintiff's figures, entered into the subcontract with plaintiff and used its figures as the basis of its successful bid for the principal contract. As already shown the defendant repudiated its contract with plaintiff within a few days after it was made. Now defendant claims that the damages that plaintiff endeavored to prove by the witness Pew and plaintiff's give them from memory now can I study them and remember them, but I can read them off." The witness was not permitted to read from the exhibit the balance of the entries thereon.

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exhibits D and E were purely speculative; that plaintiff failed to prove what it would cost it to perform the contract; that plaintiff failed to prove that it sustained any actual damage; that the evidence before the court warranted the assessment of only nominal damages; that the court properly refused to admit plaintiff's exhibitsD and E in evidence; and that no ruling of the court was requested by plaintiff to permit its witness Pew to read from exhibits D and E.

In the leading case of <u>Masterton</u> v. <u>Mayor of Brooklyn</u>, 7
Hill 61, where the plaintiffs therein undertook and partially performed their contract with defendants to furnish labor and material for the erection of the Brooklyn city hall and the defendants indefinitely suspended the work, the court said at pp. 73, 74 and 75:

The main question in the case arises out of the claim of the plaintiffs in respect to that portion of their contract with the defendants which remained wholly unexecuted in July, 1837. I think the plaintiffs are entitled to recover the amount they would have realized as profits, had they been allowed fully to execute The defendants are not to gain by their wrongful their contract. act, nor is that to deprive the plaintiffs of the advantages they had secured by the contract, and which would have resulted to them from its performance. The jury must therefore ascertain what it would probably have cost them to complete the contract, over and above the materials on hand; including the value of the marble required, the labor of quarrying and preparing it for use, the expense of transportation, superintendence, and insurance against all hazards, together with every other expense incident to the fulfilment of the undertaking. The aggregate of these expenditures is to be deducted from the amount which would be payable for the performance of this part of the contract, according to the prices therein stipulated, and the balance will be the damages which the jury should allow for the item under consideration.

"Remote and contingent damages, depending on the result of successive schemes or investments, are never allowed for the violation of any contract. But profits to be earned and made by the faithful execution of a fair contract are not of this description. A right to damages equivalent to such profits results directly and immediately from the act of the party who prevents the contract from being performed.

* * *

[&]quot;The party who is ready to perform is entitled to a full indemnity for the loss of his contract. He should not be made to suffer by the delinquency of the other party, but ought to recover precisely what he would have made by performance. This is as sound in morals as it is in law." (Cited with approval in Kingman v.

exhibits D and E were purely opeculative; that plantiff fill of prove what it would oost it to perform the contract; that to prove what it sustained any notual damage; that the evidence before the court marranted the presenct of only nominal damages; that the court properly riused to ment the plaintiff's exhibits D and E in evidence; and that no ruling of the court was requested by plaintiff to permit its witness Fe. to the court was requested by plaintiff to permit its witness Fe. to read from exhibits D and E.

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Hanna Wagon Company, 176 Ill. 545; L. S. & M. S. Ry. Co. v. Richards, 152 Ill. 59.)

It will be noted that the rule enunciated in the <u>Masterton</u> case is that the amount recoverable as damages in this character of case is the difference between "what it would probably have cost them to complete the contract" and the amount payable under the contract. In our opinion the rule is the same whether the contract is partially performed or whether it has been repudiated by one party before the other party has had an opportunity to perform.

In <u>Guerini Stone Co. v. P. J. Carlin Construction Co.</u>, 240 U. S. 264, where a subcontractor was suing for breach of a contract, under which he was to furnish and construct the concrete work of a post office and court building at San Juan, Porto Rico, the court said at p. 280:

"There was testimony as to the profits that plaintiff probably would have gained if the contract had been proceeded with in the ordinary manner. But this question was excluded from the consideration of the jury upon the ground that the profits were contingent and speculative. In this there was error. The testimony was from an experienced witness, and included an estimate of the total cost to plaintiff of the doing of the work called for in the subcontract. This amounted to \$53,012. The contract price was \$64,750. The witness testified that a profit of \$9,700 would have been made. Whether he intended to say \$11,700 was for the jury to determine. No more definite or certain method of estimating the profits could well be adopted, than to deduct from the contract price the probable cost of furnishing the materials and doing the work. Phila., Wil. & Balti. R. R. v. Howard, 13 How. 307, 344, Hinckley v. Pittsburgh Steel Co., 121 U. S. 264, 275; Anvil Mining Co. v. Humble, 153 U. S. 540, 549.

That the law does not demand proof of damages to an absolute certainty, but is satisfied with proof of the approximate loss in cases of this kind, is held in Barnett v. Caldwell Furniture Co.,

277 Ill. 286, where the court said at p. 289:

"It is perhaps true that absolute certainty as to the amount of loss or damage in such cases is unattainable, but that is not required to justify a recovery. All the law requires is that it be approximated by competent proof. That proof of the exact amount of loss is impossible will not justify refusing

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U. S. 264, where a subcontractor was suing for 'T: No of construct,
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compensation. If that were the law, contracts of the kind here involved could be violated with impunity. All the law requires in cases of this character is that the evidence shall with a fair degree of probability tend to establish a basis for the assessment of damages. Landis v. Wolf, 206 Ill. 392; Illinois Central Rail-road Co. v. Byrne, 205 id. 9; Chapman v. Kirby, 49 id. 211; Wakeman v. Wheeler & Wilson Manf. Co., 101 N. y. 205; Hess v. Citron, 76 N. y. Supp. 994; Cross v. Florsheim, 92 id. 832; Aetna Life Ins. Co. v. Mexsen, 84 Ind. 347; City of Terre Haute v. Hudnut, 112 id. 542; Spencer Medicine Co. v. Hall, 78 Ark. 336; Emerson v. Pacific Coast and Norway Packing Co., 96 Minn. 1.

It thus clearly appears that plaintiff was entitled to recover substantial damages by reason of defendant's repudiation of
the subcontract if its less and damage were established by competent
evidence and that the testimony of an experienced witness as to an
estimate of the total cost to plaintiff of doing the work called for
in the subcontract is competent evidence.

This case was tried nearly nine years after the contract was made and breached. Pew, by refreshing his recollection from an examination of exhibit D prepared by himself on the morning of the day the contract was entered into, did establish the total cost of the work to be performed by plaintiff and the profit it would have made if permitted to perform and complete the work under the contract. Plaintiff then sought to show how the total estimates as shown in exhibit D were arrived at. Pew testified that they represented the aggregate of the detailed items and their costs, which were contained in exhibit R, where they had been reduced to writing by himself and plaintiff's estimator in the regular course of plaintiff's business in contemplation of their use as a basis for the contract with defendant and defendant's bid for the principal contract; that all the detailed items entered by plaintiff's estimator in exhibit E were checked by Pew as to their accuracy and that the amounts set opposite every item in exhibit E represented its cost at the time it was entered. Pew fairly stated to the court that he had no independent recollection of the hundreds of entries on exhibit E and that it was impossible

for him, even after attempting to refresh his recollection by an

compensation. If that sere the law, anthes. of the in in a compensation of this character is hat the evic so that a character of demages. Lendis v. elf, see III. 1883; lained a substant solution of the evic solution of the evic solution of the evic solution of the evic solutions of the evic solutions.

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of the hundreds of entries on exhibit that the transfer in the

for him. even after attemption to refresh his recollection by

examination of that exhibit, to testify as to such items from memory, but that he knew that when exhibit E was prepared and reduced to writing the items entered thereon were true and correct. We think that under the circumstances as shown the trial court improperly restricted Pew's testimony when it refused to permit him to read the items contained in exhibit E.

In Diamond Glue Co. v. Wietzychowski, 277 Ill. 338, in discussing this question, the court said at pp. 346-47:

"Without attempting to state comprehensive rules applicable to all cases in which writings may be used to assist the memory of a witness, it may be said that a writing can properly be used for the purpose of refreshing the memory of a witness if he is able, after inspecting the writing, to testify to the facts from present recollection. * * * Another condition under which a writing may be used is where the witness, after inspecting a writing, still has no independent recollection of the facts stated therein, but is able to state that he correctly reduced them to writing at the time of the occurrence or within such a time afterward that he had If the witness knows that the a perfect recollection of them. facts were recorded at the time or when they were fresh in his memory, and that the memorandum would not have been made unless he knew the facts therein stated to be true when it was made, he will be permitted to make use of it, provided the writing is produced with an opportunity for cross-examination as to it, so that the jury may also draw their conclusion as to the facts. *

In <u>Richardson Fueling Co. v. Seymour</u>, 235 Ill. 319, in an action of assumpsit to recover for coal sold and delivered to a ship, the trial court was sustained in allowing a tug boat captain to read from a book of entries showing dates and amounts of deliveries, after testifying that the entries were made at the time of the deliveries and that he knew them to be true.

We have considered the other points urged but in the view we take of this cause we deem it unnecessary to discuss them.

In view of the fact that the trial court, after denying defendant's motion for a finding in its favor at the close of plaintiff's case, suggested and intimated to counsel for defendant that, if he presented a motion to find the issues in plaintiff's favor with an assessment of merely nominal damages against defendant, it would be sustained, it would be extremely unfair

examination of that exhibit, to terdify as to such from from memory, but that he knew that when exhibit I was prepared and reduced to writing the items extered thereon were true and correct. We think that under the circumstances as shown the trial court improperly restricted wests testinony than it release to permit him to read the items contained in ethicit I.

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under the circumstances to preclude defendant from making such defense as it might have to plaintiff's claim. We think the ends of justice will be best served by a retrial of the case in its entirety.

The judgment of the circuit court is therefore reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Friend and Scanlan, JJ., concur.

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Triend and Scanlan, Jr., concur.

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P. ECONOMAKOS, for the use of AMALGAMATED TRUST & SAVINGS BANK, a corporation,

Appellant.

v .

THE LIVE STOCK NATIONAL BANK OF CHICAGO, a corporation, garnishee defendant, and HALSTED PACKING HOUSE, Inc., a corporation, intervening petitioners,

Appellees.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

287 I.A. 628⁴

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a judgment of the municipal court entered January 29, 1936, against the beneficial plaintiff, Amalgamated Trust & Savings Bank, and in favor of Halsted Packing House, Inc., the adverse claimant, in an action of garmishment based upon a judgment for \$151.86, obtained by the Amalgamated Trust & Savings Bank against Peter Reconomakos.

nishee in the garnishment proceedings and the statement of claim filed therein December 31, 1935, alleged that October 19, 1932, the Amalgameted Trust & Savings Bank recovered a judgment in the municipal court for \$151.68 against Peter Economakos; that execution was issued thereon October 20, 1930, which was returned by the bailiff "no property found" on the same date; that defendant had no property in his possession liable to execution; that plaintiff had just reason to believe that the garnishee defendant, Live Stock National Bank of Chicago, was indebted to and had in its possession "effects or estate" of said defendant; and that

P. ECONOMINOS, for the use of AMALGAMATED TRUST & SAVINGS BASH, a corporation,

Appellant,

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THE LIVE STOOK EATIONAL BANK OF CHICAGO, a corporation, garnished defendant, and HAL TED PACKING HOUS, Inc., a corporation, intervening petitioners,

APPLUT TROM SENTETIAL

MR. ISSSIEN GIRTON OF THE SOURT.

This appeal seeks to reverse a judgment of the municipal court entered January 26, 1936, against the ben-ficial claimit.;

Amalgamated Trust & Savinge Bank, and in fever of Malated Perking House, Inc., the adverse claimant, in an action of generalment based upon a judgment for Albl.86, obtained by the smalgaset of Trust & Savings Bank against Peter Compando.

The Live Stock in thomal Bank of This 20 was named garnished in the garnishment proceedings and the statement of claim
filed therein becomber 31, 1955, alleged that the boler 19, 1910,
the Amalgameted Trust & Savings Bank recover desjudgment in the
municipal court for \$151.66 against Peter Sconouckos; that execution was issued thereon Sctober 20, 1950, abich to returned
by the bailiff "no property found" on the arms dots; that defendant had no property in his possession liable to execution; that
plaintiff had just reason to believe that the garnishee defendant,
thee Stock Mational Bank of Chicago, was indebted to and task
its possession deffects or cotates of said defendant; and that

there was due from defendant to plaintiff \$151.86 with interest thereon from October 19, 1932, which with costs amounted to \$187.73.

The garnishee's answer to plaintiff's interrogatories, filed January 4, 1936, averred "that at the time of service of the writ of garnishment and at the time of answer in this cause, the said garnishee, Live Stock National Bank of Chicago, a corporation, had in its possession \$187.73, deposited in said bank in the name of Mid-City Packing House, which company, the garnishee believes is solely owned by Peter Economakos, principal defendant herein."

January 8, 1936, the Halsted Packing House, as an adverse claimant, filed its intervening petition, which is as follows:

"Your Petitioner JAMES PANAGAKIS respectfully represents that he is the President and duly authorized agent of the HAISTED PACKING HOUSE, INC. an Illinois corporation; that said corporation is organized and existing under and by virtue of the laws of the State of Illinois, and that the said corporation operates the premises located at 736 South Helsted Street, Chicago, Illinois; and doing business under the name of MID CITY PACKING HOUSE.

"Your Petitioner further represents that the MID CITY PACKING HOUSE is owned and operated by the HALSTED PACKING HOUSE, ING.

"Your-Petitioner further represents that the HALSTED PACKING HOUSE, INC. had a bank account at the LIVE STOCK NATIONAL BANK OF CHICAGO under the name of MID CITY PACKING HOUSE and that the funds in said bank are owned and belonged to the aforestad corporation.

"Your Petitioner further states that on the 31st day of December, A. D. 1935, a garnishment was issued against the funds of the said corporation, said garnishment being predicated on a judgment rendered against one PETER ECONOMAKOS as an individual herein and that the said plaintiff has garnished the funds of the corporation.

"Your Petitioner further states that the said PETER ECONOMAKAS is employed by the HALSTED PACKING HOUSE, INC. and the subsidiary company MID CITY PACKING HOUSE, merely as an employee and manager, with the authority to sign checks on behalf of the company.

"Your Petitioner further alleges that checks are withdrawn from the said MID CITY PACKING HOUSE either by PETER ECONOMAKOS as manager or JAMES PANAGAKIS as President. there was due from defendant to plainvill 151.86 Ath interest thereon from October 19, 1932, which with coute emounted to \$197.73.

The garmishee's answer to pleintim's unterrog vorter, filed Jeauery 4, 1936, averred that at the time of ecryice of the writ of garmishee, Live stock Astional Hank of Shic go, a curtice said garmishee, Live stock Astional Hank of Shic go, a curporation, had in its possession '187.73, deposited in said bank in the name of Mid-Sity P-cking House, which company, the grandianes believes is solely owned by Other Conomakos, principal defendant herein."

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premises located at 756 Couth Histor Street, Chicago, Illinois;
and doing business under the name of Mil TI Y & ONIGE HOUSE.

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"Your Petiticmer outher represents that the H.L.T. B. PACKING HOUSE, INC. had to bank account at the JATV. STOOM ... TENAL BANK OF CHICAGO under the name of MID DITY PACKING HOUSE and that the funds in said bank are owned and belonge to the riorestad corporation.

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"Your Petitioner further states that the said PETER ECONOMAKOS has no interest or ownership in any of the funds now garnished at the LIVE STOCK NATIONAL BANK OF CHICAGO and that the said funds belong to the HALSTED PACKING HOUSE, INC., and its subsidiary the MID CITY PACKING HOUSE.

"WHEREFORE your Petitioner prays that the said garnishment be dismissed and that the funds now held by reason of the aforesaid garnishment writ be released and for such other and further relief in the premises as the Court sees fit."

After hearing, the trial court found the issues against plaintiff and ordered the garnishee discharged.

The only question presented for our determination is whether the finding of the court was manifestly against the weight of the evidence.

We deem it unnecessary to discuss the evidence in detail. The testimony of James Panagakis, president, director and stock-holder of the intervening petitioner was meagrely abstracted, but we have examined all the testimony of the witnesses and the documentary evidence in the record, and find that while there is some conflict in the evidence it is sufficient to sustain the allegations of the intervening petition.

A finding of a trial court on controverted facts in a trial without a jury is entitled to the same weight on appeal as the verdict of a jury. The trial judge saw and heard the witnesses and had advantages which we do not possess in judging of the weight which should be given to the testimony where there is a conflict. Under the law and established rules of practice the conclusions of the trial judge should not be disturbed unless it clearly appears from the record that such conclusions are wrong. (City of Quincy v. Kemper, 304 Ill. 303; Kuehne v. Malach, 286 id. 120; Podolski v. Stone, 186 id. 540; Wood v. Price, 46 id. 435.)

After careful consideration of the evidence in this

16. 435.)

"Your Petitionor further states that the said PATAR BOOMCMANOS has no interest or ownership in any of the funds now garnished at the LIVA STOCK ARTIONAL HAAR OF CHICAGO and that the said funds belong to the HALTELD PACKING HOURS.

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ifter carried consideration of the evidence in this

cause we are not prepared to hold that the conclusions reached by the trial judge are wrong or that the finding of the trial court is manifestly against the weight of the evidence.

The judgment of the municipal court is affirmed.

AFFIRMED.

Friend and Scanlan, JJ., concur-

cause we are not prepared to hald that the caminatons reached by the trial judge are wrong or that the finding of the trial court is manifestly against the weight of the cyldence.

The judgment of the municipal court is affirmed.

Friend and Scanlan, JJ., concur.

In re Petition of KATIE HOLUB, Appellee,

MICHAEL PAITL and JOSEPHINE PAITL, Appellants. Appeal from

County Court

Cook County.

287 I.A. 6291

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Michael Paitl and Josephine Paitl, his wife, filed a bill of complaint in the Circuit court October 22, 1930, charging Katie Holub and others with fraudulently inducing the said Paitls to execute a bill of sale conveying a tea and coffee store owned by them to one Anton Mainz, and a decree was entered in that proceeding in which it was ordered "that a judgment be and the same is hereby entered herein for and on behalf of said complainants and each of them and against said defendant, Katie Holub, for a total sum of principal and interest amounting to \$6,261.10."

Pursuant to such decree, the Paitls (hereinafter for convenience referred to as the plaintiffs) caused to be issued by the clerk of the Circuit court a capias ad satisfaciendum, under which Katie Holub was taken into custody by the sheriff of Cook County. February 8, 1935, she filed a petition in the County court under the Insolvent Debtors Act for her release from such custody. Upon the hearing on her petition she introduced in evidence the original bill of complaint filed by the plaintiffs in the Circuit court proceeding and the amendment the meto, as well as the decree entered therein, and she testified as to the correctness of the schedule filed by her, specifying her assets and liabilities. On May 10, 1935, the County court found "that malice is not the gist of the action" in the Circuit court proceeding and entered judg-

ment ordering that the petitioner, Katie Holub, be discharged from the custody of the sheriff. This appeal seeks to reverse the judgment of

the County court. Katie Holub, petitioner in the County court and the appellee here, filed no brief.

n re Petition of

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ICHAEL PAITL and

Appelles,

Appellants.

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Michael Pritl and Jorophine P. i'l, at affe, filed a 111 of complaint in the Circuit court October (), 3 30, oner ing actie elub and others with fraudulently insider the sit listils to execute

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ald defendant, Katie Holub, for a tot 1 cus of oringing and interest sounting to \$6,761.10." Pursuant to such decree, the sattle ("erein fter for

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Labilities. On May 10, 1835, the Count, sourt found "that malice is not he gist of the action" in the Circult court roceeding out entered july ent ordering that the petitioner, batie Holub, be disc ar and the

astody of the shoriff. This appeal seeks to revense the judgm nt of de County court. Katte Holub, retitioner in the County court and the

returned. "

Plaintiffs' bill of complaint in the Circuit court action alleges substantially that they were on October 1, 1923, and for several years prior thereto, the owners of a tea and coffee store, together with merchandise and fixtures contained therein, located at 4017 W.

26th street, Chicago, Illinois; that they became interested in the purchase of a bungalow at 5337 South Normandy avenue, Chicago, Illinois; that they were introduced to one Anton Mainz, who was represented to be the owner in fee of said premises; that negotiations for the sale thereof the the Paitls were carried on by Katie Holub, sister of Mainz, and her son, Anthony S. Holub, an attorney at law; that the parties met October

1, 1923, and a contract drawn by Attorney Anton S. Holub was executed by

Mainz and the Paitls for the sale of said bungalow to the latter for

\$9,500.

The bill of complaint further alleges that this contract, which was attached to said bill and made a part thereof, provided that plaintiffs were to assume the existing mortgage of \$3,500 on said property, to deliver immediately the title to and the possession of their tea

and coffee store to Mainz at an agreed "consideration of \$4,000," to execute and deliver a second mortgage for \$1,000 on the property purchased and to pay \$1,000 cash upon the consummation of the sale; that a bill of sale conveying the tea and coffee store be given Mainz "as additional deposit as earnest money" upon the purchase price of the property; that Mainz was to convey to the purchasers a good and merchantable title to said real estate "by statutory general warranty deed" with release of dower and homestead rights and subject to no existing leases and furnish them with a certificate of title, a merchantable abstract of title or a merchantable title guarantee policy made by the Chicago Title & Trust Company; and that "in case material defects be found in said title and so reported, then, if said defects be not cured within sixty

days after such notice thereof, this contract shall at the purchaser's option become absolutely null and void and said earnest money shall be

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Plaintiffs' bill or somplaint in the Arouit court ction

alleges substantially tast they were on Sotober 1, 1985, and for soveral years prior thereto, the owners of a testend coffer store, torether
with merchandise and fixtures contained therein, locates at 4017 a.

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that they were introduced to one Anton Swinz, the was remembed to be the owner in fee of gaid premises; that degotitions for the sale there of the Paitle were carried on by Katie Wolub, slater of Mainz, and he son, Anthony S. Holub, an atterney at law; that the expetter tetober 1, 1925, and a contract draws by Atto mey auton C. Rolub was executed by

Mainz and the Paitle for the sale of said bungelow to the latter for \$9,500.
The bill of complaint further alleges that this contract, which was attached to gaid bill and made a part thereof, provided that

plaintiffs were to assume the existing mortgage of 2,000 on said property, to deliver immediately the title to and the posses ion of their teamed soffee store to dains at an agreed "consideration of 4,000," to execute and deliver a second mortgage for 1,000 on the property our-chased and to pay 31,000 cash upon the consummation of he sale; that a

chased and to pay '1,000 cash upon the consummation of he sale; that a bill of sale conveying the tes and coffee store he given thains "as additional deposit as earnest money" upon the purchase erice of the property; that Mains was to convey to the purchasers a good and merchantable title to said rest satete "by statutory governd were not deed" with re-

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title and so reported, then, if said defect, be not curse, i. in sirty days after such notice thereof, this contract shall st this whom. 'regition become aveclutely null and yold and said earnest manny shall be

The bill further alleged that at the time said contract was drawn and executed plaintiffs were not represented by counsel and relied entirely upon the fairness and integrity of Katie Holub, her son and other defendants present; that, knowing this to be true, the defendants, including Katie Holub, wrongfully, fraudulently and knowingly induced and caused the Paitls to execute the said real estate contract as prepared and presented to them, containing the provision that they then and there execute a bill of sale conveying their tea and coffee store to Mainz; that the defendants wrongfully and fraudulently procured plaintiffs to execute and deliver to Mainz said bill of sale at that time "as earnest money" as provided in said contract and to deliver the possession of their tea and coffee store to Mainz, since which time they have been deprived of its possession.

The bill also alleges that an opinion of title was thereafter presented to plaintiffs, which disclosed that one Jacob Kisosondi claimed an interest in said real estate adverse to that of Mainz; that they made an immediate demand upon Mainz and his attorney to clear the title to said real estate, but the defect was not cured within the sixty days provided in the contract; and that for more than six months thereafter repeated demands were made to cure said defect, but the defendants failed, neglected and refused to do so.

The bill then alleges that, immediately after the execution of the real estate contract and the receipt by them of plaintiffs' bill of sale of their tea and coffee shop on October 1, 1923, Mainz and Katie Holub took possession of said store and caused it to be transferred and sold to an innocent third person, who paid value therefor, and that the store has since been sold to various persons so that it cannot be easily identified nor taken possession of without damage to innocent third persons who have dealt with the property; that said store was sold by Katie Holub and Mainz with the assistance of Anthony S. Holub long before plaintiffs ascertained that Mainz could not deliver a good and merchantable title to the real estate involved in the aforesaid contract;

The bill further, lie of the time asid contract drawn and executed yl intiffs have not represented by counsel and lied entirely upon the fairness and interity of hatte holub, her cond dother defendants present; that, knowing this to be true, the dendents, including Katie holub, wrongfully, fraudulently and knowing induced and caused the Paitle to execute the said real eatate contributed and presented to them, containing the provision that act as prepared and presented to them, containing the provision that by them and there execute a bill of cale conveyion taste test and coffe atomatis wrongfully and frauculently presented plaintiffs to execute and deliver to saint acid will of sale at time "as earnest money" as provided in the contract and to deliver because the deprived of the passession of their test and coffee store to besing, oince which time and been deprived of the passession.

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fore plaintiffs assertained that mainz could not deliver a good and

that the proceeds of the sale of the tea and coffee store were received and kept by the defendants, including Katie Holub; that a long time after the contract for the sale of the real estate in question was made plaintiffs learned that Katie Holub owned an undivided half interest in such real estate; that the said premises have since been conveyed to other persons; and that plaintiffs had made repeated demands upon defendants to pay them \$4,000, the agreed value of said tea and coffee store, which demands have been refused and ignored.

The bill prayed, among other things, that complete

answers be filed by the defendants disclosing their dealings with plaintiffs, their respective interests in said real estate, the disposition they made of the tea and coffee store, who shared in the proceeds of the sale thereof, why plaintiffs were procured to execute a bill of sale to said store and to deliver to Mainz immediate possession thereof, whether they knew of the claimed interest of Kisosondi in said real estate and what interest he actually had therein and why they could not deliver to plaintiffs a good and merchantable title thereto; that the court find that the bill of sale to the tea and coffee store and the delivery of the possession of said store had been fraudulently procured, and order said sale set aside; that the defendants and each of them be decreed to pay plaintiffs \$4,000, the agreed value of their tea and coffee store, with interest to the date of the entry of the decree; and that "upon their failure to pay said sums so decreed the court order to be issued a capias ad satisfaciendum "for the complete enforcement of the decree. "

The amendment to the bill of complaint in the Circuit court action alleges in substance that at the time of the signing of the real estate contract the Normandy avenue property had already been incumbered with a junior mortgage trust deed, recorded July 1, 1923, securing a note for \$1,750, dated July 25, 1923; that this second mortgage was an additional cloud upon defendant's title, to which plaintiffs objected immediately upon receiving notice thereof, but, notwithstanding their objection, defendants neglected and refused to

that the proceeds of the sale of the tea and coffee for ments and kept by the defendants, including datic folde; the defendants,

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The bill prayed, show often this, the cound to newers be filed by the defendants disclosing their respective interests in said or lest to, the disciplifity, their respective interests in said or lest to, the disciplifity they made of the test and course, and shared in the consecution the sale thereof, any chaintiffs were incurred to execute a lite of sale to said store and to deliver to define interest of inter

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nts and each of them be decreed to may of intifity the wife of their tea and coffee store, with interest to the distribution of the decree; and the furpose their failure to only said outs to expect the court order to be indeed a capier sea assistancies of the court order to be indeed a capier sea assistancies of the court order to be indeed.

The amendment to the bill of complint in the direction ourt action alleges in substance that at the time of the circuit in real estate contract the Wormandy avenue property has already been nowabered with a junior mortgage trust deed, recorded July 1, 1= 5,

securing a note for \$1,750, cated only 25, 1253; that this second nortgage was an additional gloud upon defendant's title, to which plaintiffs objected immediately u on receiving notice thereof, out,

cure this defect so that a good and merchantable title could be delivered to plaintiffs within sixty days as provided in the aforesaid con-

The decree of the Circuit court found and ordered inter

alia:

tract.

"That on, to-wit, October 1, 1923, the complainants entered into a written contract for the purchase of a bungalow at 5337 South Normandy Avenue, Chicago, Illinois, for the agreed price of \$9500.00: that the contract was executed by complainants as purchasers and one ANTON MAINZ as purported owner and seller thereof; that negotiations for the sale of said real estate were carried on by the defendant KATE HOLUB, a sister of said ANTON MAINZ; that said KATE HOLUB was an owner of said real estate together with said ANTON MAINZ, which fact was tinknown and

was undisclosed to the complainants herein.

"That at the time the parties entered into said contract, the said defendant KATE HOLUB, then and there wrongfully, wilfully, knowingingly, and fraudulently induced the complainant herein to execute a bill of sale, selling and conveying to said ANTON MAINZ a tea and Coffee Store, then owned by said complainants, located at 4017 West 26th Street, Chicago, Illinois, of the agreed value of \$4000.00, as earnest money for the consummation of said real estate purchase contract, and to immediately deliver title to and possession of, said Tea and Coffee Store to said ANTON MAINZ, on behalf of said defendant KATE HOLUB, and that said KATE HOLUB immediately thereafter took possession and exercised absolute dominion and control over said Tea and Coffee Store, as her own property, and that within approximately six weeks thereafter, she sold and transferred the said Tea and Coffee Store to an innocent purchaser and retained the proceeds thereof; that the assets of said Tea and Coffee Store have been fully dissipated and cannot be found or identified. (Italics ours.)

"That the agreed value of said Tea and Coffee Store is \$4000.00 which the complainants are entitled to have returned to them, together with interest thereon from October 1, 1923, at the rate of Five Percent Per Annum, which interest amounts to \$2261.10, making a total of \$6261.10, due and owing to the complainants herein, at the date hereof.

"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the contract entered into on October 1, 1923, between ANTON MAINZ as seller and the complainants herein as purchasers of the real estate at 5337 South Normandy Avenue, Chicago, Illinois, be and the same is hereby cancelled and declared null and void and of no further force and effect.

MIT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the sale and delivery of said Tea and Coffee Store by the complainants to said ANTON MAINZ and to said defendant KATE HOLUB, be and the same is hereby vacated, set aside, and held for nought, title and possession thereof having been fraudulently obtained from the complainants herein.

*IT IS FURTHER ORDERED, ADJUDGED and DECREED, that a judgment be and the same is hereby entered herein for and on behalf of said complainants and each of them against said defendant KATE HOLUB, for the total sum of principal and interest amounting to \$6261.10, and that an execution or capias ad satisfaciendum or both may issue against said defendant KATE HOLUB, for said \$6261.10, together with the costs paid out by the complainants herein. "

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It is urged that the allegations of the bill of complaint in the Circuit court proceeding and the finding of the decree of that court that the tea and coffee store of plaintiffs was fraudulently procured from them by Katie Holub established malice as the gist of the action.

In Corwin v. Tillman, 255 Ill. App. 230, where the

propriety of the issuance of a capias ad satisfaciendum to enforce a decree in equity was questioned, the court said at p. 238: "While the action is in form for equitable relief the gravamen and gist of the action is a tort clearly set out in the second amended bill, namely, the perpetration of a malicious fraud. Had complainant brought an ex delicte action of deceit based upon the same state of facts and obtained judgment there would be no question as to the malice being the gist of such action and that a ca. sa. would issue to enforce the judgment. Upon the same facts malice is none the less the gist of the action because relief is sought in equity, and under the principles stated in Whalen v. Billings, supra, resort may be had to the same remedy as at law to enforce the collection of the decree for money. The allegations in the amended bill and the finding in the decree are that defendant falsely and fraudulently made the misrepresentations to

complainant therein recited for the purpose and with the intention of deceiving and defrauding him. It cannot be doubted, therefore, that malice was the gist of the action. The test is not the form of the action (Barney v. Chapman, 21 Fed. 903) nor the specific relief asked, but whether the form

In re Paar, 264 Ill. App. 372, the court said at p. 377:

but whether the facts upon which the fight of action rests imply malice. "

the "While the defendant does not contend in this court that the gist of action, as alleged in each count of the declaration, was not malice except on the theory that the tort was waived by bringing an action of assumpsit, and which contention we have held untenable, yet we are of the opinion that malice is the gist of each count of the declaration. It alleges that fraud and deceit of the defendant in the exchange of the properties, * * *. Malice is the gist of the action of fraud and deceit. Jernberg v. Mix, 199 Ill. 254; Scanlon v. Whalen, 249 Ill. App. 19. #

In Lipman v. Goebel, 357 Ill. 315, the court said at p. 325:

"The defendant cannot be permitted to offer evidence in this proceeding that his conduct was not willful and malicious. That issue was submitted to the jury in the tort case, and both counts of the declaration having charged malice as the gist of the action, the judgment of the trial court, later affirmed by the Appellate Court is res judicata upon the issue. *** We hold that malice was the gist of the action in the case at bar. "

It is manifest that where equitable relief is sought as here for the perpetration of a malicious fraud, malice is the gist of the That is the "gist of the action" which constitutes the basis of action. the suit and without which the suit could not be maintainable. It is the essential ground or object of the suit, without which there is not a cause

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the case at bar. "

It is urged that toe while which of the all of col-

plaint in the Circuit court proceeding and the finite. of the degree of that court that the tes and coffee store of all intiffs was from lently procured from them by Natie - club established mulike og tik - i -t of the action.

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propriety of the issuance of a captage ed authorated or to enforce and decree in equity was questioned, one court said at r. r2f:

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malice was the gist of the action. The tesm is not man form of the setion (Barney v. Chepman, of Fed. 205) nor the secific relief asker, but whether the facts upon which the fight of setion nests tack mela. In re Fear, 294 Ill. Apr. UT:, the court wild st p. 172:

the "While the defendent does not contend in this court that the gist of sotion, se alleged in each count of the declaration, we not malice except on the theory taut the tort was valved by bringing un motion of accumpait, and which contention | e have sell unversible, get we are of the opinion that malice in the tast of each count of the constion. It alleges that fraud and deceit of the defendant in the second

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"The defendant council be permitted to since evidence in tal. proceeding that his conduct was not willful an allocous. The last was submitted to the jury in the tort case, and hot case of the stien having charged malice as the gist of the action, the jure of the the trial court, later affirmed by the Appellate Court is very juicity to the issue. *** a hold that notice was the first of the action in

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of action. The case alleged in plaintiff's bill of complaint in the Circuit court was one charging malice and not merely for the recovery of money. Malice was, therefore, the gist of the action and the capias ad satisfaciendum was properly issued. (Greener v. Brown, 323 Ill. 221.)

The judgment of the County court is reversed and the cause remanded with directions to remand the petitioner to the custody of the sheriff.

REVERSED AND REMANDED WITH DIRECTIONS.

Friend and Scanlan, JJ., concur.

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Friend and Scanlan, JJ., concur.

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CORA B. SPENCER, Appellant,

VS.

CITY OF CHICAGO, a municipal corporation, Appellee.

Appeal from 287 I.A. 629

Cook County.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an action brought by plaintiff, Cora B. Spencer, against defendant, City of Chicago, to recover damages for personal injuries alleged to have been sustained by her January 25, 1934, as the result of falling on a defective curb stone and sidewalk in said City of Chicago. On March 3, 1934, forty-six days after the accident, plaintiff served the statutory notice provided under the Injuries Act upon defendant by leaving a copy thereof with William H. Sexton, Alexander M. Smietanka and Peter J. Brady, corporation counsel, city attorney and city clerk, respectively, of said city. Such notice failed to state plaintiff's address. At the close of plaintiff's case the trial court sustained defendant's motion to direct the jury to find the City of Chicago not guilty, because the notice served did not comply with the statute in that it failed to state plaintiff's address. The jury returned a verdict as directed and judgment was entered thereon. This appeal followed.

Plaintiff's complaint, including the defective notice, was filed April 9, 1934. The defendant filed its answer April 25, 1934, in which it denied the negligence charged and demanded proof by plaintiff as to the care exercised by her at the time of the occurrence, as to her injuries and as to the service of the statutory notice. Thereafter, on February 13, 1935, the defendant was allowed to file an amendment to its answer, which denied "that the Notice of the alleged accident served on the City of Chicago and set forth in paragraph 6 of the complaint is a sufficient Notice" and asserted that it "does not comply with the statute requiring said Notice to

CORA B. SPENUES, Appellant,

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OITX OF CHICAGO, a municipal corporation, Arbellee.

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This appeal follower.

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be given, in that no address or place of residence of the plaintiff is set forth in said Notice.

In the presentation of plaintiff's case she introduced in evidence over defendant's objection a carbon copy of a letter dated Pebruary 21, 1934, which contained her address and shich she claimed was sailed to "Filliam R. Bexton, Raq.," then corporation counsel of the City of Chicago, suggesting an adjustment of her claim. Motice had been served on defendant to produce the original of such letter, but it declared its inability to do so.

plaintiff contends that the letter ment to the corporation counsel prior to her service of the purported statutory notice upon the aforesaid officers of the defendant cured the alleged defect in said statutory notice since it designated plaintiff's address; that "by filing an answer that assumted to a general issue" the defendant valved any defect in the statutory notice; and that the city took undue advantage of plaintiff by waiting until after the expiration of the six months provided by statute for the service of the notice to file the amendment to its answer, calling attention to the defect in the notice.

Perendant's theory is that the service of the notice required by statute is mandatory; that plaintiff's address is one of the essential requirements prescribed in the statute and that the failure to include same in such notice renders it fatally defective; that the failure to designate the address of the injured party in the notice is such a defect as cannot be cared by the latter written to the corporation counsel of the City of Chiesgo prior to the service of the notice, which letter stated said address; that the filling an answer in the nature of a plea of the general issue "did not waive the question of a defective notice;" and that no question of good faith is involved in this sause.

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Section 2 of "An Act concerning suits at law for personal injuries against cities, villages and towns (par 7, sec 2, ch. 70, Ill. State Bar Stats. 1935) requires that "any person who is about to bring any action or suit at law in any court against any incorporated city, village or town for damages on account of any personal injury shall, within six months from the date of the injury, or when the cause of action accrued, either by himself, agent or attorney, file in the office of the city attorney (if there is a city attorney, and also in the office of the city clerk) a statement in writing, signed by such person, his agent or attorney, giving the name of the person to whom such cause of action has accrued, the name and residence of the person injured, the date and about the hour of the accident, the place or location where such accident occurred and the name and address of the attending physician (if any)."

In Erford v. City of Peoria, 229 Ill. 547, the Supreme Court held that the notice required by sec. 2 as above set forth is mandatory and a condition precedent to the right to bring such an action against a municipality. In Walters v. City of Ottawa, 240 Ill. 259, the court held at p. 263: "The statute expressly declares that if the required notice is not given, any suit brought shall be dismissed and the plaintiff barred from further suing. The city has no power to waive the notice and is under no liability until it is given." In Ouimette v. City of Chicago, 242 Ill. 501, the court said: "The question of notice is entirely within legislative control" and "that the wrong date in the notice is, in effect the same as if no date at all were given." In Condon v. City of Chicago, 249 Ill. 596, it was held that "The notice attached to the affidavits was defective because it did not state about the hour of the accident."

In <u>Swenson</u> v. <u>City of Aurora</u>, 196 Ill. App. 83, the court said at p. 92:

"But the most serious defect in the notice in question is the failure of appellee to state his place of residence. The residence given in the notice was not his and never had been. The omission of the place of residence is clearly fatal to the validity of the notice. And it is clear that this defect cannot be cured by the

Section 2 of "d. e. - mergine of the strong section of the strong all injuries against cities, villages not to assist of the transfer of the strong any section of suit so less that "and opened the transfer of the strong of the strong of the strong of the strong the strong of the strong of the city attends of the city attends of the city attends, which is strong to the strong of the city attends, setting of the city attends, given the strong of the city of the strong of the city of the strong of the city of the city of the strong of the city of the strong of the city of the strong of

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showing that he resided at some other place on the same street, for it is the very fact that he resided at some other place than the one mentioned in the notice that renders the notice invalid. Unquestionably, the purpose which the Legislature had in view in requiring the notice to state the name and address of the party injured and the name and address of the attending physician was to give cities, towns and villages in cases of this kind correct information, upon which they could properly pursue their investigation, to ascertain the extent and nature of the injury suffered by the person injured, which in many cases might become, as it did on the trial of this case, an important and controverted question. It is evidence therefore, that a definite and correct statement as to the residence of the party injured, in the notice, is of co-ordinate importance with a correct and definite statement of the place where the injury occurred."

It is manifest from the above decisions that the notice filed with the officials of the City of Chicago in the instant case was fatally defective and precluded plaintiff from maintaining her action. In Minnis v. Friend, 360 Ill. 328, where the notice was held defective because it lacked the signature of the person injured or his agent or attorney, the court said, "The notice should not have been admitted in evidence and a motion to direct a verdict for the City of Chicago at close of plaintiff's evidence should have been allowed." Inasmuch as plaintiff's notice was invalid and inadmissible in evidence, it is idle to urge that it was cured or could be cured by the letter containing her address, heretofore referred to, from plaintiff's attorney to defendant's corporation counsel.

The record discloses no objection on the part of plaintiff to the order of the court allowing defendant to file the amendment to its answer which challenged the validity of the notice, and it has been repeatedly held that a question not raised in the trial court cannot be presented for the first time on appeal. Defendant's original answer, if it waived anything, could only be held to have waived defects as to form in plaintiff's complaint. The defect in question in plaintiff's notice was material and substantial in that it constituted a failure to comply with one of the essential requirements of the statute. In our opinion the trial court did not abuse its discretion in allowing defendant to amend its answer.

In answer to plaintiff's claim that the defendant was

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plaintiff to the order of the court allowing defended in the mendment to its anexer which challenged the which to be and it has been repeatedly held the a day that now of the court cannot be presented by the first if the north of the fresh if the waived defects as to fore in the interestion in plaintiff, solice was not in that it constituted a failure to comply into the creation of the atatute. In our of the statute. In our of the statute.

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guilty of bad faith in failing to call her attention to her defective notice within the six month period allowed for filing notice so that she might
have cured same, it is sufficient to state that it was the duty of plaintiff and her attorney to file a proper valid notice that complied with
the statute, the provisions of which are clear and unambiguous. There is
no question of bad faith on the part of defendant involved in this case.

For the reasons stated herein the judgment of the Superior

AFFIRMED.

FRIEND and SCANLAN, JJ., concur.

court is affirmed.

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PETER L. EVANS, as Successor Trustee, Plaintiff,

VS.

WORTHIE W. HAYNES, et al, Defendants,

PETER L. EVANS,

Appellant,

VS.

WILBUR E. HOWETT, et al, Appellees, Appeal from
Circuit Court

Circuit Court

Cook County.

287 I.A. 629

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse an order entered by the Circuit court removing Peter L. Evans as trustee under the trust deed being foreclosed, as trustee in possession of the mortgaged premises and as receiver therefor. The appellees filed no brief.

Peter L. Evans (hereinafter for convenience referred to as the respondent) was by the terms of the trust deed foreclosed in this proceeding designated and appointed successor trustee to the Home Bank & Trust Company, the original trustee, which filed the complaint herein but became insolvent during the pendency of this cause. The bank through its receiver resigned as trustee and the respondent acting as successor trustee in its place and stead was substituted as plaintiff. Evans was placed in possession of the mortgaged property involved February 9, 1933, for the purpose of operating and managing same, which he did until August 1, 1935. On that date objection was raised to his managing the property as trustee after the entry of the decree of foreclosure, and pursuant to such objection an order was entered authorizing him to act as receiver of the premises. The order appointing respondent receiver expressly stated that he was so appointed to obviate any objection which might be raised to his management of the property in the capacity of trustee after entry of thedecree of foreclosure. April 2, 1936, one

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Wilbur E. Howett and others, purporting to act as agents for certain holders of bonds secured by the trust deed in question, filed a verified petition seeking the removal of the respondent as trustee and as receiver. The petition contained no charges of fraud, misconduct or mismanagement on the part of the respondent as trustee or receiver, except the claimed assertion that he leased the premises at an inadequate rental. The petition further charged, however, that Evans had been ordered to make a report as receiver to the court, which had not been made, and that certain accounts payable of the owner, who had theretofore been placed in possession of the property in lieu of a receiver, had not been paid, although respondent had been directed to pay them by order of court. The petition did not charge that any property or moneys coming into the hands of the respondent as trustee or receiver had been illegally disbursed, wasted or misapplied.

Evans filed a verified answer denying the material allegations of the petition and the matter was set down for hearing April 6, 1935. A hearing was held on that day, at which no evidence was intreduced to support the charges made in the petition. Additional hearings consisting only of colloquy between court and counsel and statements and argument of counsel were thereafter had, but no sworn testimony or evidence of any kind was offered or received at such hearings. At these hearings unsupported and unverified statements were made by counsel representing the petitioners and counsel for the respondent repeatedly objected to the method of procedure, requesting an opportunity to be heard and to submit evidence. On the late afternoon of April 8, 1936, at the conclusion of such hearings as were had, the court instructed counsel for respondent to draft and present to counsel for all interested parties an order containing provisions for the removal of Evans as trustee and receiver and directing him to file his final account in ten days. Notwithstanding that the court had instructed counsel for Evans to draft and present the order indicated, the following day, April 9, 1936, an order removing the respondent as trustee and receiver was presented to the court by someone from the office of

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8, 1936, at the equalization of such results and present to conceller of the structed counsel for respondent to which and present to conceller an order containing review for the recoval of fivans as trustee and receiver and thresting all to file his first occupt in ten days. Notaithetanding that the court will instructed counsel for Evans to draft and present the order includes, the following day, April 9, 1256, an order removing the responsing a trust of a trustee.

Attorney H. J. Rosenberg and no previous notice of the presentation of this order to the court was given to counsel for any of the interested parties, nor were they given an opportunity to examine the same before its presentation. This order, which was entered by the court in the absence of counsel for the petitioners and respondent, did not in all respects conform to the directions of the court and, as has been stated, was prepared not by respondent's counsel as instructed by the court but by counsel for another party in interest in the foreclosure proceeding who did not represent any of the petitioners on whose behalf the immediate petition was filed.

Pursuant to notice, counsel for respondent presented to the court April 13, 1936, the order removing respondent as trustee and receiver, which he had been directed by the court to prepare. The court refused to enter this order and informed counsel for respondent and the other counsel present that an order removing Evans as trustee and receiver had already been entered. At this hearing a Mr. Fishman from Attorney Rosenberg's office, admitted presenting the order which had been entered and also admitted that he had neglected to include therein a provision fixing the amount of the appeal bond as fixed by the court April 8m 1936. Counsel for the respondent called the court's attention to the fact that he was not present at the time of the presentation of the order entered April 9, 1936, and that he did not have an opportunity to examine it before its entry. He then objected to the entry of said order of April 9, 1936, and the procedure followed in connection with its entry, but without avail. The court allowed the order of April 9, 1936, to stand, permitting it to be amended to show the amount of the appeal bond as previously fixed. Thereafter, on April 20, 1936, respendent presented a petition and motion to vacate the order of April 9, 1936, removing him as trustee and as receiver, which order was peremptorily denied by the court without affording respondent an opportunity to be heard on his motion and petition. The order of April 9, 1936, contained a number of findings of fact which were totally unsupported

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exptorily denied by the court without effording respondent in or retunity to be heard on his motion and petition. The order of the content of the contained a number of fingings of fact with sore out ily unsupported by evidence introduced at any of the hearings and some of the findings contained therein are not even supported by the allegations of the petition presented for the removal of respondent.

Respondent contends that the finding and order of the trial court are not supported by any evidence; that the court was without power to remove him as trustee except upon presentation of a proper petition charging misconduct or other acts inconsistent with his duties as trustee, and then only after a hearing at which he was afforded an opportunity to present evidence in his defense; that the court abused its discretion in ordering the removal of the respondent as receiver without requiring evidence in support of the allegations of the petition for his removal; that the court erred in denying respondent the right to be heard on the charges against him contained in the petition; that the court erred in not requiring petitioners to prove that they had a beneficial interest in the trust estate before removing respondent as trustee; and that the court erred in entering the order of removal without notice to the parties of its entry and without giving them an opportunity to examine such order

The chancellor heard no evidence in support of the charges contained in the aforementioned petition and absolutely refused to hear evidence which the respondent requested that he be permitted to offer to refute such charges. The law is settled in this state that a trustee cannot be removed except upon charges of breach of trust, dismonesty, fraud, mismanagement or some other breach of fiduciary duty and then only after a hearing on evidence offered and received in support of the charges and an opportunity afforded the trustee to refute same.

(Cohen v. Central Republic Trust Company, 282 Ill. App. 569; People v. Powell, 353 Ill. 582; White v. Macqueen, 360 Ill. 236; Bauer v. Lindgren, 279 Ill. App. 397; In re-Scott, 62 N. Y. S. 1059; In re-Kilgore, 22 N.E. 104; Perry on Trusts, 6th Ed. Secs. 276, 277.) That this rule is general-

pefore it was entered.

"This general rule applied to the removal of trustees is that such removal should not be made unless there are acts or circumstances endangering the trust fund, such as mismanagement, incompetency, or

ly recognized appears from 65 C. J. 633, sec. 482, where it is stated:

by evidence introduced at any of the meanings of wise of the ining contained therein are not even suprorted by the allerations of the petition presented for the removal of respondent.

Respondent contends that the finding and order of the brial court are not emported by any svidence; that the court was diknout power to remove him as trustee eroupt upon one en ation of a moner potition charging misconduct or other acts inconsistent with disconduct or other acts inconsistent with disconduct or other acts inconsistent with disconding and then only after a hearing at which as was afforced and epstunity to present evidence in his defense; they the court abused it.

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removal; that the court erred in denying respondent the right to be neard in the charges against him contained in the petition; that the court erred in requiring petitioners to crove that they had a beneficial interest in the trust estate before resolving respondent he trustee; and that the perties wert erred in entering the order of removal without notice to the perties of the entry and without giving them an opportunity to expense and order

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Cohen v. Centrel Republic Trust Toupany, 232 111. Apr. 567; Peorla v. Pewell, 253 111. 582; White v. Mecauses, 380 411. 55; beuer v. Indireu. 79 111. App. 397; In re- Scott, 62 d. v. S. 1058; In re-411 ore, co.

he charges and an opportualty afforded the trustee to refute same.

104; Perry on Trusts, 6th Ed. Secs. 76, 277.) That this muic is generally recognized appears from 65 C. J. JSE, sec. 432, where it is stated:

*** **This general rule applied to the removal of trustees is that

dishonesty. "

It was not even shown that the petitioners who sought the trustee's removal or those they claimed to represent were beneficially interested in any manner in the trust estate. The established rule is that only a party beneficially interested in the trust estate may petition the court for the removal of a trustee. The right to apply for removal of a trustee will be denied to persons lacking the requisite interest in the execution of the trust. (65 C. J. 629, sec. 470; Cohen v. Central Trust Company, supra; Holman v. Renaud, 125 S. W. 843.)

One of the grounds alleged in the petition for the removal of Evans as receiver was that he was not qualified to act in that capacity since he was the trustee plaintiff in the proceeding. It is a generally recognized rule that a party to the suit should not be appointed receiver therein. Iroquois Furnace v. Kimbark, 85 Ill. App. 399; High on Receivers, 3rd ed. 70; Benneson v. Bill, 62 Ill. 408; Finance Co., v. C. R. R. Co., 45 Fed. Rep. 436.) Where, however, all of the parties in interest agree to or acquiesce in the appointment of a trustee as receiver, we perfeive no equitable or legal bar to such appointment. In the instant case no objection was raised to Evans acting as receiver of the premises except by the petitioners, and, their interest in the property involved not having been shown, the chancellor was not justified in removing respondent as receiver on their petition. As to the other grounds alleged for the removal of Evans as receiver, no evidence was offered by the petitioners to substantiate the charges made and the rules heretofore set forth as to the removal of a trustee are applicable to the removal of a recelver.

In any event, the entry of the order removing Evans as trustee and as receiver without notice to the parties and without giving them an opportunity to examine same, constituted an unwarranted abuse of discretion by the chancellor. It will be remembered that on April 8, 1936, the chancellor instructed counsel for the respondent to draft the order of removal and present same to counsel for all interested parties

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and that, notwithstanding such instruction, on the very next day, April 9, 1936, the order of removal in question, prepared and presented by counsel for a party not interested in the immediate proceeding, was entered without notice to counsel for any of the other parties. The action of the court in this regard was highly improper and cannot be countenanced.

For the reasons indicated herein the order of the Circuit court of April 9, 1936, is reversed and the cause remanded with directions to allow the parties a proper hearing on the merits on the petition for the removal of the respondent as trustee and receiver and the respondent's answer thereto.

REVERSED AND REMANDED WITH DIRECTIONS.

and that, notwithstanding such insuraction, on the version, the order of removal in the such or pared in the reserved in the counsel for a party not interested in the immediate throughout notice to counsel for any of the other testion. The action of the court in this regard was highly improper and carnot be countenanced.

For the reasons indicated der in the or er of the Circumstant court of April 8, 1930, is reveled in the exuse wouldness with directions to allew the parties a proper nearth, on the worth on the removal of the respondent as trustee and recuited and the respondent is answer thereto.

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ELSA HOCKANSON, Appellee,

Y.

CHICAGO CITY BANK & TRUST COMPANY, a corporation, Appellant. APPEAL FROM INTERLOCUTORY
ORDER OF JULY 24, 1936 OF
SUPERIOR COURT OF COOK COUNTY.

287 I.A. 630

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse an order entered by the Superior court July 24, 1936, granting plaintiff, Elsa Hookanson, a temporary injunction against defendant, Chicago City Bank & Trust Company (hereinafter referred to as the bank) without notice and without bond. When the court on August 10, 1936, continued its motion to dissolve the injunction to September 21, 1936, defendant filed its notice of appeal August 19, 1936.

The injunction was ordered solely upon the allegations of count four of the complaint, which are in substance that plaintiff is a resident of Chicago and defendant is a bank; that plaintiff was the owner and holder of a note for \$7,500 secured by trust deed, which she deposited as collateral security with the bank to secure an indebtedness due from her to defendant upon her collateral note; that default having been made in payment of interest due upon her note secured by the trust deed, which plaintiff had deposited with the bank as collateral, defendant through its attorneys foreclosed said trust deed in the name of plaintiff and obtained a decree of foreclosure and sale of the property described therein; that such property was bid in at the sale October 2, 1933, in the name of plaintiff for \$8,200, which

MISA HOTKANSON,

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CHIC (60 CTIT BARK & T-U'S CONTAKY, a corporation, Appellant.

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This appeal seeks to reverse an order entired by the superior court July 16, 15 6, grant(her glannist), 3.4 lockement, a temporary injunction adding to it no ht, this early that the formation adding to it no ht, this early thereinefter refere a so eb. 18) and out notice and without bond. Then the cours on uput 1.1, 1.5, continued its motion to discolve the light of an equal to a ribe.

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was less than the amount due under the decree; that the sale was confirmed and a deficiency decree entered in favor of plaintiff for \$943.22; that plaintiff indorsed the master's certificate of sale in blank and the bank held it as collateral security for plaintiff's indebtedness to it; that the bank "held the said certificate for collateral purposes only as collateral security to the plaintiff's several notes executed from time to time, each in renewal of another, the last of which notes was executed April 23, 1926, due 60 days after date, for the principal sum of \$7,637.10; that in addition to said master's certificate defendant continued to hold as collateral security for the payment of plaintiff's renewal collateral note of April 23, 1936, five real estate loans notes signed by Emma Flack Chavis, in the aggregate par amount of \$9,825, an extension agreement, a trust deed, a mortgage policy and an insurance policy, all pertaining to property at 5221 South Michigan avenue, as well as a certificate of deposit for a bond signed by Etta M. Whittingham for \$1,000; that plaintiff is informed that since April 23, 1936, defendant has exchanged the \$9,825 Chavis notes and received in lieu thereof \$3,200 Home Owners Loan Corporation bonds signed by said Chavis, which bends are plaintiff's property; that without plaintiff's knowledge and consent defendant, through its agents and officers, caused the name of William E. Fisher, then one of the bank's attorneys and agents, to be inserted in the master's certificate over her blank indorsement, purporting to complete the assignment of the certificate to the bank; that the period of redemption of the property involved in the foreclosure proceeding expired October 3, 1934, and the owner of the equity therein, Walter Zwinskes, lived and resided in part of the premises and rented the remaining portion thereof since the date of the sale; that May 18, 1936, without the knowledge and

was less than the amount ca. und it is december the land was confirmed and a deficiency ecords there. I from a. L. L. tiff for 1943.22; that plaintiff in orseo the du tell arrilla cate of sale in blank and the book hold is as only to the security for plaintiff's indubtudness so it; the bould "held the eals certificate for collaborat purposes only sa collaborat scennity to the plaintiff's paveral notes executed inverting of sime. each in renewal of custoer, the dunch the content of content of 23, 1926, due 60 days ofter date, for the principal cum of \$7,637.10;" that in addition to seld masker's a roid incite or make in ant continued to hold as collateral security in his great of plaintiff's renewal collateral mote of pril 't, lege, five real estate loans notes signed by Tuna Floor Oh wis, in the agreemet ar smount of \$5,825, an extension transfer at true teet, a mortgage policy and an insurance policy, will pertaining to the erer at 5221 bouth Michigan avenue, as sell as certificate of for a bond signed by atta M. Mittingham for (1,001) thet [Lainvill is informed that since Levil 23, 1936, defend at him exchanged the \$9,825 Chavis notes and received in 11.5. thereof . 3,200 Home Canara Losn Corporation bende signed by eald Shevie, which sends take plantitt's property; that without plainthit buowlerg; the tenderty to seem and through the agents of the party, of the through William E. Figher, then one of the santi- atsorneys and equats, to the master in the master's certific to over her blank inforcement, purporting to complete the east present of the critical to to benk; that the period of redempited of the property wolve in the forcelosure proceeding expired October 1, 1950, our the owner of the equity therein, Walter swinsker, lived and related in part of the premises and rented the remaining possion the sealest the date of the sale; that May 18, 1936, without the knowledge and

william E. Fisher, permitted said Walter Zwinskes to redeem the property from the sale and said William E. Fisher certified the redemption in writing on the master's certificate; that the master's certificate centained an indersement thereon that Walter Zwinskes paid the full amount for which the real estate described in said certificate was sold, together with interest and costs and that "the sale evidenced by the within certificate has been duly redeemed according to law, and that the certificate and duplicate thereof of record in the office of the recorder of deeds in and for Cook county, Illinois, have become and now is null and void;" and that the master's certificate bearing the certificate of redemption was thereafter rerecorded in the office of the Recorder of Deeds of Cook county.

Count 4 also alleged that "Walter Zwinskes was then required to pay \$9,512 * * * to the defendant for the benefit of this plaintiff for the redemption of said property from said foreclosure sale as required by law;" that "plaintiff has requested and demanded that the defendant credit said redemption money on her note for \$7,637.17 for which it held the said Master's Certificate as collateral, and pay her any sum due her after the satisfaction of her said note, and to surrender all other collateral which it holds for her said note; this the defendant bank has failed and refused to do and threatens it will sell the aforesaid collateral other than the Master Certificate on said note and confess judgment on her said note. That the aforesaid redemption money for said Master Certificate is more than enough to satisfy the plaintiff's said note held by the defendant, and that the said money should as required by law, be applied to satisfy her said note; that she believes that if the defendant is not restrained and enjoined by order of this court that the defendant will sell at a sacrifice

comment of plaintiff, relate the on him to the accounty dillian E. Hisher, permitted and relief wind to redeem the property from the sale and activitiem? Figure or wiffed the redemption in writing on the matter's certificate and the matter's certificate and the sale and the sale and the following the relief the full mount for thich the relief the full mount for thich the interest and certificate and the full mount for thich in relief the full coots and in said certificate and the face that the sale evidenced by the labin on different and on different and the recording to law, and that the sale evidenced by the the record of the an deplicate thereof of record in the office of the record of the sale and that the master's certificate because and no is and and that the master's certificate bearing the certificate of the condition was thereafter reseconded in the office of the county.

quired to pay : 9,512 * * * to the descard are for the ben 14t of this plaintiff for the redempth in of act, producing from a in large closure male as required by last "this "this "is her because as else errors no years acitya for sit tillers thebreteb ent tant bebrameb box her note for \$7,637.17 for which it had the a till a ter's Certificate as collateral, and cay has sure aud due not after the satisfaction of her said note, and so surrend r all other a all to I which it holds for her said note; this a first and as how her filled end refused to do and threatens is will sold the effort of the factor thought, hat income ton birs in otabilities retained and nedt radto That the aforeact's is composion money for which en her said note. Master Certificate is more than now h to setimy the liling. said note held by the defendant, one the take menay thould as required by law, be applied to setlefy he. eld not; the take believes that if the def ndent is not restricted and adjoiner by order of this court that the defendant will beil . . s ascrilice

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the aforesaid Home Loan Bonds and said Certificate of Deposit
No. 22 for bond No. 30 signed by Etta Whittingham for \$1,000
and any other collateral, which it might have belonging to the
plaintiff, and that it will confess judgment on her said note
and cause her to defend said judgment, all of which would irreparably
injure and damage the plaintiff, and that the defendant should be
temporarily enjoined and restrained from so doing, until the further
order of the court.*

It was further alleged in this count that "the defendant should be required by order or decree of this court to satisfy plaintiff's note, from the redemption money from said foreclosure sale and to surrender said note and the aforesaid bonds, insurance policies, and Trust Deeds, if any, which it holds as collateral for said note, of this plaintiff and render to this plaintiff a full, true and complete statement of moneys received and expended pertaining to said collateral. That the plaintiff believes that said injunction, should issue without notice to the defendant and without bond by this plaintiff that she believes it would be injurious to her interest to give notice of her application for said temporary injunction."

The complaint was filed July 22, 1936, and on July 24, 1936, the order for the temporary injunction was entered as follows:

"1. From selling, transferring or disposing of, in any way

the Home Owners Loan Corporation bonds towit \$3200.00

*2. The Certificate of Deposit #22 for bond #30 signed by

Etta M. Whittingham for \$1,000 all held by it as collateral for

plaintiff's note dated April 23, 1936.

*3. And from confessing judgment or suing at law or in equity upon plaintiff's said note held by it for \$7,637.17 until

the further order of this court.

"4. For good cause shown plaintiff is excused from giving bond herein."

[&]quot;It is therefore ordered and decreed, that the Clerk of this court issue the people's writ of injunction restraining the Chicago City Bank and Trust Company, a corporation defendant, its agents and attorneys

the aforesaid Nome Lean Bonds and said Cartificate of Japosit No. 22 for bond No. 30 signed by sita hittingh a for \$1,000 and any other collateral, which is might have belonging to the plaintiff, and that it will confess judgment on her said no. 6 and cause her to defend said judgment, all of which would irreparably injure and damage the plaintiff, and that the defendant should be temporarily enjoined and restrained from to doing, until the turther order of the court.

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The was further alleged in this count that the defendent should be required by order or decree of this count to destining tiff's note, from the redemption maney from said foreclouse said and to surrender said note and the aforesaid conds, in arance policies, and Trust Deeds, if any, which it holds as culitteral for said note, of this plaintiff and render to this old invite a full, true and complete statement of moneys received and expended pertaining to said collateral. That the plaintiff believes that said injunction, should issue without notice to the defendant and dishout bend interest to give notice of her application for said temporary injunction."

The complaint was filed July 22, 1936, and on July 24, 1936, the order for the temporary injunction was entered as follows:

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*2. The Certificate of Deposit \$22 for bond \$30 signed by Etta M. Whittingham for \$1,000 all held by it as collateral for plaintiff's note dated April 23, 1936.

"3. And from confessing judgment or suing at law or in equity upon plaintiff's said note held by it for \$7,637.17 until the further order of this court.

*4. For good cause shown plaintiif it excused from riwing bond herein."

[&]quot;It is therefore ordered and decreed, that the Clerk of this court issue the people's writ of digmetion restraining the Chicago City Bank and Trust Company, a corporation defendant, its agents and attorneys

in violation of its rights as defined in secs. 3 and 9 of an act to Revise the Law in Relation to Injunctions, as Amended, (ch. 69, Ill. State Bar Stats., 1935); that sec. 3 provides that no court shall grant an injunction without previous notice of the time and place of the application therefor unless it shall appear from the complaint or affidavit accompanying same that the rights of the plaintiff will be unduly prejudiced if the injunction is not issued immediately or without notice; that "there was no showing to this effect in the complaint and no affidavit accompanied the same;" that sec. 9 provides "that before an injunction shall issue the plaintiff shall give bond in such penalty and upon such condition and with such surety as may be required by the judge, provided bond may not be required when for good cause shown the court is of opinion that the injunction ought to be granted without bond;" and that no cause was shown that the injunction should be granted without bond.

Plaintiff's theory as stated in her brief is that "there is alleged in the complaint upon which the injunction issued sufficient facts to make it appear to the chancellor issuing the injunction order that plaintiff's property rights would be prejudiced or damaged if he did not issue the order without notice to the defendant, as provided in sec. 3, chap. 69, Ill. State Bar Stats., 1935; and that the Chancellor, within his sound discretion, for good cause shown from the facts alleged in the complaint, properly excused plaintiff from giving bond; and that the injunction order properly issued without notice to the defendant and without bond."

The facts alleged in plaintiff's sworm complaint must be accepted as true and, in our opinion, such facts were sufficient to have made it reasonably appear to the trial court that plaintiff's rights would be unduly prejudiced if the injunction did not issue without notice. It appears from the complaint that the master's certificate, which the bank held as collateral for plaintiff's note

to the first of the talk a control of a second of the seco to Revice the Law in Bulktion to Tajum tous, as 11. 1 . D. 4 . O. or this white Bor . o. tada the TOL . atat. End of the ALLI . 88 overt shall grant an injuneral netronsink na thara liada trucc time and place of the applie tion thereion unlike is the man from the complaint or cificavit accornanting a no shet the right of the plaintiff will be underly voriginized it the Industrian in not issued immediately or tibout notice; the tibout as colleging this offeet in the employer has a fair of teeth aid to swast if it is heart, I am ocoled a dir solvery ? . o a tadt "; omsa the plaintiff that give bond and the tit the title of the and with such our ty as may be required by the judge, mayided bout may not be required when for good end enhow the sourt is or opinion on that this 'thing of the grant better the condition of cause was shown that the injunction should be grant d ... thous cond.

Plaintiff's theory as stated in her brick is that "there is alleged in the complaint upon which the injunction issue. Surfacent facts to make it appear to the chancellor issuing the log assign order that plaintiff's property rights would be prejudiced or danged if he did not issue the order dishout notice to the defendant, as provided in sec. 3, chap. 19, 111. Itse Bar State tate, 1915; and that the Chanceller, within his sund charaction, or sood cause shown from the facts alleged in the complaint, proved vertext limit. I have from giving bond; and that the infunction order properly is and without notice to the defendant and without bond."

The facts alleged in plaintiff's sworm coupl intenset be accepted as true and, in our opinion, cuch frote were tufficient to have made it reasonably appear to the tital ocus, that that is infinitely projudiced if the injunction of not is ue without notice. It appears from the complaint that the matter's

for \$7,637.17, due June 23, 1936, evidenced the sale of the property in question October 2, 1933, to plaintiff for \$8,200. The bank had without plaintiff's knowledge or consent caused to be inserted over her blank indorsement in the master's certificate the name of William E. Fisher, one of its agents and attorneys, as her assignee. May 18, 1936, to redeem the property the mortgagor paid to the bank's agent and attorney \$9,512, which included the amount for which the property was sold at the foreclosure sale and interest on same. Learning of the redemption, plaintiff demanded of the bank that it apply the aforesaid redemption money received by it to the satisfaction of her note. This the bank failed and refused to do. The bank held as additional collateral security for the payment of plaintiff's note \$3,200 of Home Owners Loan Corporation bonds and a certificate of deposit for another bond of \$1,000, which it threatened to sell, as well as to confess judgment upon her note. Plaintiff believed that defendant would execute its threat so made, sell the bonds held as collateral to her note and confess judgment on said note, if not restrained, causing her irreparable injury and damage.

There was ample justification for the chancellor to fairly conclude from these facts and others alleged in the complaint that, in view of its refusal to turn over to plaintiff the aforementioned bonds and balance of cash, if any, remaining in its hands after paying itself the money due on plaintiff's note with interest thereon, and its threat to sell said bonds and to confess judgment on the note, the bank might or would sell or transfer the bonds between the time of the service of notice of the application for the injunction and the hearing upon such application, in which event plaintiff's rights would be unduly prejudiced.

In Skelers v. Meyer, 246 Ill. App. 18, where a temporary injunction was issued before a lease term began, to restrain the

for . 7,687.17, do June 23, 1986, vicaded the acapater in exception actions 8, 1983, to definitiff for a, a the best had without winingist's as owners to come or some of the being store or a her blank indonsement in the 12 stort secretified to the come of . . Thing to the agents one of the agents and the second in the contract of May 18, 1986, to reduce the property the near rance yet to the beauti agent and ottorney 29, 18, thich include the trust for which the ear to describ her of a subscious of the fier caw yaragorq Learning of the redungation, Lainvil on more of the reduction in the teacher spply the closs of the contract method that the color by tion of her note. This the back faller was attention of hens held as additional collateral security in the rest of dalatiffs note \$3,500 of home Owners Loan Corpor tion boads and a cordific to of dayonit the carth of Man, 1000, A to once there were then to hewelfed Tel mint . odom co. and them to about our the first and the se that der normt would execute it with the action of call the bond, held registratined, counting her the particles injust and see each

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There was caple juntified sion for the of allow to fairly conclude from those facts and others elleged in the terms of the refusal to lurm over to plain it? the offers the offers the order and belance of oach, if they, remaining the offers the fact of a fair the coney due on plained at a the site of the fact thereous and to come at the threat thereous and to come at the threat to sell said comes and to come at the fact of the cone of the cone that it is come but act to the three the cone would sell or transf or the fact of the cone but act the three of the cone of

In Meders v. Myer, 286 111, p. 1., who a a temperary junction was issued to force a lower time begin, to restrain the

lessor from leasing adjacent property contrary to the terms of the prior lease on the property in dispute, this court said at p. 21:

"The chancellor might well have been of the opinion that if notice had been given to the defendants they would have proceeded at once to consummate the proposed violation of the covenants of the lease. Under the circumstances the effectiveness of the injunction would largely depend upon the promptness with which it was issued. We think it sufficiently appeads that the rights of the complainants might have been unduly prejudiced if notice had been required. Cases approving the issuance of an injunctional order without notice are Stafford v. Swift, 121 Ill. App. 508, Village of Itasca v. Schroeder, 182 Ill. 192. Every such case depends upon its pecular facts, and citations covering different situations are not helpful."

Instead of alleging the ultimate fact in the language of the statute that "the rights of the plaintiff will be unduly prejudiced" if the injunction is not issued without notice, plaintiff alleged in her complaint that "she believes it would be injurious to her interests to give notice of her application for said temporary injunction. Defendant insists that plaintiff's failure to conform to the exact language of the statute in alleging her apprehension of injury, danger or prejudice to her rights if notice were given, renders her complaint fatally defective. This contention is without merit. While the allegation of plaintiff's complaint that "she believes it would be injurious to her interests to give notice is somewhat inapt and it is usual and customary to follow the language of the statute in this regard, after all the material and important thing is the allegation of sufficient facts so that it shall appear to the court from the complaint or affidavit accompanying same "that the rights of the plaintiff will be unduly prejudiced" if the injunction is not issued without notice. We repeat that the facts amply justified the chancellor's conclusion that the rights of plaintiff might have been unduly prejudiced if notice had been required.

Objection is next made to the issuing of the injunction without requiring the plaintiff to give bond. The only result of

lessor from lendin for no prejenty come, y or the brane of the prior lesse on the property in the mat, this other feet p. 21:

"The chancellor with well involves, of the option and if notice had been given to the ordendate they, wild have graded at once to consume the the proposed violation of the savenants of the lease. Unter the structure of the injunction ould largely depend upon the prosponders with which it was assued. A think it colliderally are use that the rights of the complainants of the complainants of the translational projection if the notice had been required. Order pyrovin the item and of the injunctional order without notice are selfford v. 112, 111 inlatingues of liases v. Johno der, 182 inl. 192. Very auch case depends upon its pocular facts, and citations over not helpful.'

Instead of all line the uttil to first in the heart of were william of ithy but I but in athia and a state of the and judiced" if the injunction is not issue lithout mostar, Chrintief anoly it is of them the are that out that satisface and at benefits to her interests to give notice of her splin tim for reid temporary injunction." Defendent inchet white inches induction to the exact lankwage of the status in alleging her apprehension of injury, danger or prejudice to hir illine if dead or in treas renders her completed fetalky declared vote and on it dishows merit. This the allegation of Limital's or, it in the bind believes it would be injuriou to har interests to iv hother is somewhat image and it is moved and survived somewhat image and it is moved of the statute in this reg ro, after ill in the in this refere thing is the allegation of bufflied no local and at prints domit" YT. to the court from the complaint, or sid to vir or true out the rights of the light of the definite will be admired junction is not istance without notice. . . nego t the the first amily justified the chemicallor's conclusion is that it is of need of the have been unsuly a just the no the in historical rejuired.

Objection is next made so the injuration without requiring the plintiff so its one. The only roult of

the injunction is to preserve the status quo of plaintiff's property in defendant's possession pending the disposition of this cause on its merits. We can see no good purpose which would be served by requiring plaintiff to file a bond, especially since plaintiff's indebtedness on her note to defendant is \$7,637.17 and interest thereon, and the bank already has in its possession her \$9,512 redemption money, her \$3,200 Home Owners Loan Corporation bonds and her certificate of deposit for another \$1,000 bond. Requirement of a bond is largely within the discretion of the chancellor and his order in this respect will not be disturbed unless there is a clear showing of an abuse of discretion.

(Skelers v. Meyer, supra; City of Kewanee v. Otley, 204 Ill. 402; New Ohio Washed Coal Co. v. Goal Belt Ry. Co., 116 Ill. App. 153; Young v. Federal Union Surety Co., 183 Ill. App. 278; West Side Hospital of Chicago v. Steele, 124 Ill. App. 534.)

The preliminary injunction was not improvidently issued and the order of the superior court is affirmed.

ORDER AFFIRMED.

Friend and Scanlan, JJ., concur.

the injunction is to prince of the production of property in octan emits. The current of a color of this order on its merits. This order of the production of the color of the

The preliminary injunction or improve this is used and the order of the our rior court is fairne.

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POLISH WOMEN'S ALLIANCE OF AMERICA, a corporation, Appellant.

STEFAN MACHALSKI et al. Appellees. APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Polish Women's Alliance of America, as plaintiff, filed a complaint in the superior court to foreclose a mortgage on real estate in Chicago securing the payment of one principal note for \$5,000, executed by Stefan Machalski and wife. The Machalskis had also executed a second mortgage on the premises which was acquired by Wesley Dondalski, who was joined as a defendant in the first mortgage foreclosure proceeding. The matter was heard by a master who found in favor of plaintiff and recommended a decree of foreclosure. Exceptions to the report were filed by Dondalski and upon hearing were sustained by the court and a decree entered dismissing the complaint for want of equity. Plaintiff appeals from that decree, and defendant Dondalski has filed a cross appeal assigning as error the court's refusal to allow him \$100 attorney's fees, under rule 10, subpar. 2, sec. 104 of the Practice act (chap. 110, Ill. State Bar Stats., 1935.)

The mortgage sought to be foreclosed was executed November 16, 1932. The Machalskis had obtained a loan from plaintiff of \$5,000, for which they then executed their principal note maturing POLISH (OMEN'S ALLIAUS OF AMERICA, a corporation, appalant, appalant,

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MR. JUSTICA PALAND DARIVAR AD PAR CHARLES OF THE STOLE.

Polish Women's Alliance of Amorica, as plaintiff, filed a complaint in the superior court to foreclose a moit care on Location to the control of the work openied at state fact note for \$5,000, executed by strien Mashalaid and sire. The Machalakis had also executed a second mortgage on the premises which was acquired by Wesley Bordeleki, the was joined as a edf .gnibecong eruselecuel eg mirem farit edf mi insbreleb: matter was heard by a master who lound in favor of pleintiff and recommended a decree of forcelevure. Exercises to the senert were filed by Dondalski and upon hearing were custained by the To dr. Told and Lambe shift will be the control a dre troop equity. Plaintiif appeals ir m da bacase, and afandant Dondslaki has filed a gross appost assiming a error the court's refusal to allow him \$100 atlorney's feet, unter rule 10, subgran 2, sec. 104 of the Pr ctice act (chap. 110, Ill. state Bar state., 1935.)

The mertgare sought to be foreclosed was executed devember 16, 1932. The Machalskin ha obtained a losh from plaintil of \$5,000, for which they then executed their principal note meturing

November 16, 1937, and bearing interest at the rate of 6% per annum. The indebtedness was further evidenced by ten interest notes for \$150 each, maturing the 16th day of May and November of each year. The first two installments of interest were paid, but default was made in payment of coupons Nos. 3 and 4, which matured respectively the 16th day of May and November, 1934. The Machalskis also defaulted in the payment of general taxes levied for the years 1931 and 1932.

The premises were subject also to a second mortgage executed by the Machalskis November 17, 1932, securing an indebtedness of \$2,500. Dondalski, owner and holder of this second mortgage, filed a bill to foreclose the mortgage February 2, 1935. The premises were sold under foreclosure decree and a receiver appointed April 13, 1935.

Pursuant to default in payment of the two interest coupons for \$150 each, due March 1 and November 1, 1934, on the first mortgage, and in the payment of general taxes levied for the years 1931 and 1932, plaintiff passed a resolution December 18, 1934, declaring the first mortgage due and payable, and instructed its general counsel to order foreclosure minutes and file a complaint to foreclose the mortgage. Helen Czachorski represented plaintiff, as its general counsel. Nothing was done by her pursuant to the passing of the foregoing resolution, nor by plaintiff, until May 2, 1935, when Edward Fleming, counsel for plaintiff herein, filed the complaint in the superior court. Foreclosure minutes, however, were not ordered until June 19, 1935. Neither Dondalski nor the Machalskis were given notice of the acceleration resolution before the filing of the bill of complaint.

There is considerable evidence indicating that prior to December 18, 1934, negotiations were had with Dondalski by which Movember 16, 1937, and bencing introde in the original armum. The indotedness was further evicence by wen interest notes for \$150 each, matering the lith day of May and hoveshed of each year. The first two institution interest or interest or justs, but default was made in payment of company mos. The first was made in payment of company mos. The first was matured respectively the lith day of key of key and for material tweed little for the years 1931 and 1932.

The premises were subject its to the received by the Machalukis devember it, luds, accuming on in brackness of \$2,500. Dendalski, ermor and helder of this second martyses, filled abilt to foreclose the mortgage February 2, 1935. The premises were sold under foreclosure decree and representations.

Furning, counsel for default in payment of the test interest componfor \$150 each, due March 1 and Nevember 1, 1958, on the livet
mortgage, and in the payment of general trace levied for the years
1931 and 1932, plaintiff passed a resolution occamber 15, 1934, declering the first mortgage due and payable, and incrueted its general
counsel to order foreclosure minutes the ribe a complaint to foreclose
the nortgage. Helen Caechershi represented 11 in iii, at its general
counsel. Nothing was done by her purturnt to the proving of the foregoing resolution, nor be plaintiff, until day; , 100., about 16 to 19
Fleming, counsel for plaintiff harden, filed the complaint in the last
superior court. Foreclosure minutes, however, were not observed until
June 19, 1955. Meither Condelski nor the last letter searc siren notice
June 19, 1955. Meither Condelski nor the last letter searc siren notice

There is considerable widence indic ting that prior to Lecember 18, 1934, negotiations were had with confushing which

plaintiff sought to acquire his second mortgage. Dondalski called at plaintiff's office November 26, 1934, at the request of Helen Czachorski, and again December 10, 1934. He testified that an offer of \$500 was made for his second mortgage, but he demanded \$1,000. He also testified that at the meeting November 26th plaintiff advised him to foreclose his second mortgage, for the purpose of scaring the Machalskis "into paying up." On the occasion of his second visit to plaintiff's office Dondalski advised Helen Czachorski that he would institute foreclosure proceedings in accordance with her suggestion, and he then placed the matter with his attorney, Maximilian J. St. George. Acting on his attorney's advice, Dondalski and his father called at plaintiff's office and tendered \$300 in currency, which was the total amount of interest then due on the first mortgage, at the same time advising plaintiff that proceedings to foreclose the second mortgage were being instituted. Dendalski testified that the tender was refused. He then made the same tender to plaintiff's attorney, and it was again refused. A renewal of the tender was again made February 26, 1935. There followed several letters by St. George, wherein he advised plaintiff and plaintiff's attorney that \$300 had been left with him to be applied on the two interest notes due on the first mortgage which he was ready to pay over whenever plaintiff indicated its willingness to accept this sum. After the bill to foreclose the second mortgage was filed, Dondalski paid the taxes then due on the property, so that there was never any sum owing except the \$300 due on two interest coupons. At the hearing before the master, St. George testified that he had received \$300 from Dondalski which he still had in his possession and desired to turn over to plaintiff, and that he wished to add an additional \$150 to cover the interest that became

plaintiff sought to oc ulk the second most rand ona Liki ceiled at plaintiff's office dovember 36, 1304, . inc r wa. t of Helin Czachorski, and again december 10, 1984. He testifiel thet en hat any of the .a. united that a sid rel often asw Job to to To 11:000. Me also testified that a. the menting november .6th plaintilf advised him to foreclose his second martgrat, for the pair no ". or min of all entitle deal est gairson to enough occasion of his second visit to plaintait of ice and to moissee advised Helen Czachorski that he would into note norglosure proseedings in accordance with her our cention, and he than placed th matter with his attorney, Maximilian J. St. deorge. oting on his attorney's advice, Dondelski and his father orlind at whistfic office and tendered \$500 in ourrency, thich was the lotal amount of interest then due on the first mortgage, or the orne time envising plaintiff that proceedings to foreclass the accoud mortgage were bein instituted. Dondalaki tentifiod ther this tene rosser fused. He then ends the same tender to plaintifite attorney, and it was again refused. A renewal of the tender was espein succe. February 16, 1935. Miere followed sow rel letters by 't, drorge, wher in he myl od min diting for a read of the transfer of the t oman J ron J rill die no out seter decetation to no bailing of of which he was ready to may over themry a chaintift is ic t its willingness to accept this sum. Ater the bill to force to scomed mortgage was filed, oncilled paid the trues then due on the property, so that there was never any and a in each pt it it is on two interest coupons. It has not into below the mater, to keep List of field the line were cooked trained the list of the had in his possession and desired to turn over to pl intiff, and that am sed tent to retain with rever of Jack femolithes as bee of bedein ed due during the pendency of the hearing. This tender was again refused. There is of course a denial on the part of plaintiff and its representatives and attorneys that these various tenders were made, but St. George's communications which speak of the tenders, and one of which states that "at any time you care to accept the interest money, let me know, and I shall see that you are paid," are uncontradicted, and none of these communications was ever answered. The master made the following finding with reference to these various tenders:

*Defendant, Wesley Dondalski, very urgently contends that some time after December 18th, A. D. 1934, he properly and lawfully tendered the sum of Three Hundred (\$300.00) Dollars to plaintiff on account of the indebtedness secured by said Trust Deed and that by reason of said tender the foreclosure herein was improperly commenced and prosecuted. The evidence with reference to the tender is not entirely uncontradicted, but in all events it is undisputed that if made it was made long after the acceleration of the note by the plaintiff through a resolution duly passed by its Board of Directors on December 18th, 1934."

We are convinced from an examination of the record that negotiations were had with Dondalski prior to December 18, 1934, in which plaintiff sought to acquire his second mortgage, and that during the conversations had with Dondalski by plaintiff's representatives and attorneys a tender was made of the amount due on the defauted coupons preceding the acceleration resolution of December 18th. Dondalski testified that in the latter part of November, 1934, he received a letter from the Polish Women's Alliance and called on Mrs. Czachorski who advised him to start foreclosure proceedings on the second mortgage; that he again called at plaintiff's office December 10th with his father, proceeded to the cashier's window and stated to the person in attendance that he desired to pay the interest on the first mortgage, stating his name and his interest in the proceeding; that he desired to foreclose the second mortgage and wanted all bills paid before filing his complaint; that his tender was refused by the person in charge, with the remark "we have

que during the pendency of the meath, fait our le con refused. There is of course a denial on the representative and its representative and according that there is on that there is on that the first in the representative and conserved a communications thick of the red enders, and one or shigh court that has any time you care to seept the interest meney, let me know, and a shall see that you are paid, are uncontradicted, and none of these commandantions was ever answered. The most in mane the interest inches to the collection that

"Defendent, We ley Dondolcki, very ungently contends that Some time after Docember 18th, A. . 1954, he properly and lawfully tendered the sum of Marce Munared (9500.00) Dollars to plaintiff on account of the indebtedness scoured by said Vinet Deed and that by reason of said tender the larcelesur herein was improperly commonced and prosecuted. The aridence ith reference to the tender is not entirely uncontradicted, but in all events it is undisputed the if now it to raid loar efter the acceleration of the note by the plainties through a resolution duly passed by its Board of Sirectors on December 18th, 1954."

We are convinced from an expaination of the record that negotiations were had with Londalski prior to December 15, 1954, in which plaintiff sought to acquire his seem mortgage, and the Curing the conversations had with wonard hi by in in it's representatives and atterneys a tender was made of the -mount cue on the et-Tauted coupons preceding the acceleration resolution of seconder 18th Dondalski testified that in the latter gort of Movember, 1984, be received a letter from the Polish omen' llignes and colled on Wes. Czachoreki who a vised him to thart forenlammer presendings on the second mortgage; that he again culls at Isinaidt of order December 10th with his father, proceeded to the cubiler's window and stated to the person in attendance that he desired to pay the interest on the first martgage, taking his more end his interest in the proceeding; th t he duited to forcelose the second mortsage and wented all wills paid becore filing his complaint; that his tender was refused by the person in charge, with the remark "we have got nothing to do with you; "that he then went to Mrs. Czachorski's office and took with him the \$300 in U. S. currency and told her that he desired to pay up the defaulted interest; that Mrs. Czachorski said, "Well, I have got nothing to do with it. The board of directors, they do not want to go with you. They go with Machalski. They want to foreclose." This and other evidence, including St. George's letters, clearly indicate that Dondalski at all times desired to make good the defaults on the first mortgage. He had been advised by plaintiff to institute foreclosure proceedings, and before filing his complaint desired to make good Machalski's defaults on the first mortgage. This desire was evidently prompted by the undenied negotiations had with plaintiff by which it sought to purchase his second mortgage.

In that situation Dondalski, who seeks to sustain the decree of the superior court dismissing the complaint for want of equity, takes the position that plaintiff should have allowed him to pay up the defaulted interest before the acceleration resolution was passed December 18, 1934, and that its refusal so to do would make it inequitable to permit plaintiff to foreclose the first mortgage. Plaintiff does not contend that Dondalski had no right to make good the Machalski defaults in order to preserve the lien of his second mortgage; it simply denies that he offered to do this. From a careful examination of the record and all the circumstances attending the negotiations between the parties, we are convinced that Dondalski made every reasonable effort to pay up the defaults on the first mortgage, but was prevented from doing so for some undisclosed reason which can by surmised only from the undisputed testimony that plaintiff was at the same time seeking to acquire whatever interest Dondalski had in the second mortgage. There is no other explanation for the fact that the acceleration resolution was passed

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In that situation Dondalski, the reske to surviin the decree of the superior court dismissing the complaint and or equity, takes the position that plaintief should have allowed him to gay un the defaulted interest before the acceleration recolution was passed December 18, 1954, and that its refusal so to be outd make it inequitable to permit plaintiff to foreclose the first wortgage. Theinon book with the content the land and the section of the section and the Machalaki defaults in order to provide the line of his second mortgages it simply denies that in offered to do this. - mett seen temmeric ent il. bus broom ent to unitanimene interes ing the negotiations between the partier, so convinces the the constant made every remember of the training of the end the salabase - hory one to the enter mort setter tree to the come to the come part closed reason which dam by warrised only wrom the undisputed testinovertel eriupos of thinge and emps the sale was thinkely taut you there is no other interest bondslaki had in the second mortgage. explanation for the fact that the acroloration resolution as polent

December 18, 1934, which was six months after default in the payment of coupons Nos. 3 and 4, and that the filing of a bill of complaint pursuant to the resolution was withheld until May 2, 1935. Neither Dondalski nor the Machalskis knew of the acceleration resolution, and while the negotiations between plaintiff and Dondalski were going on he was not apprised of the election of plaintiff to accelerate the entire debt and had no notice of the impending foreclosure until the complaint was actually filed. During the several months preceding the filing of the bill Dondalski and his attorney, St. George, were in constant touch with plaintiff and its representatives and evidently sought in various ways to pay the defaulted debt and were at the same time negotiating for the sale of the second mortgage to plaintiff. To sustain the decree of foreclosure under these circumstances would be inequitable. The only debt due when the complaint was filed were two interest coupons for \$150 each and some \$129 in back taxes. Dondalski paid the back taxes and was apparently ready at all times to pay the \$300 due as interest, and even as late as the master's hearing he renewed the tender and offered to pay an additional \$150 on a coupon that had matured during the pendency of the cause. We fail to see any necessity or justification for the filing of the foreclosure proceeding under the circumstances. Should we permit the foreclosure decree to stand defendant Dondalski would be in the position of having expended the costs of foreclosing the second mortgage, including filing fees, master's and attorneys' fees, and the sums paid on account of taxes, all at the instigation of plaintiff, who advised him to foreclose, without any chance of recovering these out-In addition thereto his second mortgage lien would be substantially destroyed by reason of the foreclosure of the first mortgage. Under the circumstances, the chancellor, in the exercise

December 18, 1934, thich was six months it to the the tenment of coupons Nos. 3 and 4, and inst the of thin of this . . vel. Illus Lambti esw notivioner and of thesup thisique 1935. Weither Dondalski nor the Mechalakis kne. of the so eleration resolution, and while the negoth tion between claimitten, endalakt vere going on he car not apprised of the election of pl. initia to accolerate the entire cobt and had no morise of the imperitat end gaing. . bolt vilatios are trisiques out fitus erasoloers? several months proceding the alling of the this ore advantaged attorney, St. George, were in constant toach with laintiff out its representatives and evidently sought in various asys to pay the defaulted debt and were at the char time he cut that the sale of the second mortgage to plaintiff. To ru him the lecroc of foreclosure under those circum tancer rould by the mit ble. The only debt due when the sample int wes filled note to content sampons for \$150 each and some '189 in book tower. 'and 1.52 peld the book er of the day of the different to be the day of the day of the interest, and even as liste . The med to be find the control of tender and rifered to ser on a . it oand it a carpon tist in matured during the pendency of the caustines of the century mecessity or justification for the Alits of the correlative graeccing under the offenese. Fruit . . of the classic off release dearee of a selection defined throught in the selection of the selection of having expended the social influences to thee at bedroom univer cluding filing fees, master's no attentys' foes, and the ans paid on account of tauer, all the he that then of preferth, he awind him to foreclose, at house our do not of recovering these outlays. In addition there's hir accome mortgage lien soul be substantially destroyed by re con of the forelower of the first mortgage. Under the circumstudes, the chruc llor, in the enrece of his equitable powers, properly dismissed the complaint for want of equity.

Dondalski's cross appeal is founded on the section of
the civil practice act heretofore cited, which provides that
any party may by notice in writing call on the other party to
admit for the purposes of the cause any specific fact or facts
mentioned in the written notice "which can be fairly admitted
without qualification or explanation, as stated therein," and
that in case of the refusal or neglect of the opposing party
to admit such fact the court may allow expenses incurred in
proving such fact, including reasonable attorneys' fees. Inasmuch
as the question of tender was a controverted issue we do not think
the statute is applicable thereto, and the cross appeal is therefore
dismissed.

Other points are urged to sustain the order of dismissal, but in view of the conclusions here reached it will be unnecessary to discuss them. The order of the superior court is affirmed.

AFFIRMED.

Sullivan, P. J., and Beanlan, J., concur-

of his equitable powers, properly dismissed to the for went of agulty.

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but in view of the conclusions have reached it will be and see by

to discuss them. The order of the superimerearth, affirmed.

Sullivan, P. J., and Rosnlam, J., concur-

38809

UNDERFUOOD VARIET COMPANY, a corporation, Appellee,

T.

FARER MACHINERY COMPANY, a corporation,
Appellant.

APPEAL FROM CIRCUIT COURT,

APPEAL FROM CIRCUIT COURT, COCK COUNTY.

287 I.A. 630

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action in assumpsit to recover demages alleged to have been sustained by reason of defendant's failure to fulfill a contract for the sale and delivery of certain machinery. Trial was had before the court without a jury resulting in findings and judgment in favor of plaintiff for \$1,807 and costs. Defendant appeals.

count and the common counts, supported by an affidavit of claim which alleged that by a certain instrument in writing plaintiff bought of defendant and defendant sold to plaintiff one Sheridan 75" veneer cutter, for which plaintiff agreed to pay the sum of \$1,250; that notwithstanding its contract with plaintiff defendant would not and did not deliver the cutter, by reason whereof plaintiff was compelled to and did go into the open market and buy a Sheridan veneer cutter at the best price obtainable and of the same kind and quality, which was \$1,872 in excess of the price for which plaintiff had previously bought same from defendant. Attached to the affidavit of claim was a copy of the instrument sued on.

Defendant filed a plea of the general issue and an affidavit

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MAGESTANDING OUTSAIN, a corporation, to list;

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Plaintiff's case as sommitted on a count of the of the count and the common counts, supported by a contain the transmit of the alleged that by a contain the transmit of a little date. I bought of defendent and defendent soll to plaintiff one half of 75" veneer cutter, for which claiming force to may the undefined not and did not deliver the contract of the plaintiff one of 12.250; that notwithstending its contract of the thirt of the tract of the contract of the consequence of the first of the contract of the contract of the consequence of the contain of the best place obtained and consists, which was (1,300 in one of the contract of the containtiff had provide by bought some a conficultion of claim was a copy of the inet mand could in.

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of merits specifically denying that "plaintiff bought and the defendant sold" such veneer cutter, and averring that the "instrument sued on was subject to acceptance at the main office, 549 W. Washington street, Chicago, Illinois; that at no time did the defendant accept said order or offer at the main office aforesaid," and that plaintiff did not sustain damages as alleged.

Defendant is engaged in the machinery business in Chicago and A. L. Fader is its president. In the spring of 1933 plaintiff, a Wisconsin corporation, located at Wausau, Wisconsin, was in the market for a veneer cutter, to be used in the manufacture of a new line of plywood panel products. George A. Vehlow, plaintiff's sales manager, was instructed by its president, O. C. Lemke, to locate a cutter that would meet the requirements necessitated by the new line of products, and in this connection he met A. L. Fader, defendant's president. As a result of this contact a 75" Sheridan cutter was located at Kokomo, Indiana, at the plant of the Davis Industries, then in liquidation. April 13, 1933, defendant offered the machine in question to plaintiff, together with other wood working machinery, for \$1,500, f.o.b. cars, Kokomo, Indiana. About a week prior thereto the Noble Machine Co., of Fort Wayne, Indiana, had offered the identical cutter to plaintiff for \$1,750, f.o.b. shipping point. April 18, 1933, A. L. Fader, in the course of a selling trip, called on plaintiff at Wausau, Wisconsin, and after considerable bargaining the following instrument, upon which plaintiff predicates its action, was signed by plaintiff:

"Order No._____, dated at Wausau, Wis. 4/18/33. The Fader Machinery Company, Inc. 549 Wast Washington Boulevard, Chicago, Ills.

(This order is not subject to cancellation)
Subject to strikes, accidents and other delays beyond
your control, please ship in good order the following machinery

of merits specifically denying that "alain is bought and the defendant sold" such vaneer cutter, and averring that the "instrument sued on was subject to socopt need a the main office, 549 W. Washington street, thiere, Thisnois; that at me sine different the defendant accept said order or offer or the mit office of order.

Defendant is engaged in the mechinery business in alleger and A. L. Pader is its president. In the oping of 1955 plaintff, a Wisconsin corporation, located at Pusen, incomin, was in the market for a veneer cutter, to be used in the markitatro of a new line of plywood punel products. George A. Vehlow, plaintiff's sales menager, was instructed by its productions, ". Large, to vd betetimmen discount would meet the commence the contract seed the new line of products, and in this connection he met . I. Rader, defendant's president. As a result of this contact a 75" heridan cutter was located at Mokomo, Indiana, ot the plant of the payis Industries, then in liquidation. pril 16, 1955, defendant offered the machine in question to plaintiff, together with other wood orking machinery, for \$1,500, f.o.b. core, Kokomo, Endicha. Cout a week prior thereto the Moble Medine does of Fort again, had and hed for 1,750, f. n.b. shipping offered the identical cutter to plain it April 18, 1933, A. . Pader, in the sour e of calling bring delled on plaintiff at caurmy fiscontin, or ofter confiderable burcalning the following instrument, upon blok deintiff procio tos it's action, was signed by plaintiff;

(This order is not subject to empellation)
Subject to strikes, so idents and other delays beyond
your control, please ship in good order the following mechinery

delivered F.O.B. Wausau, Wis.

- 30- 24-inch x 48 inch Factory Trucks complete with stakes, each \$2.50 ----

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for which we agree to pay upon arrival complete and in good condition after date of shipment Thirteen Hundred & Twenty-five & no/100 Dollars with exchange.

The purchaser agrees to make settlement within thirty days after date of shipment and to then evidence all payments due at a later date by notes bearing date of shipment and interest. The Purchaser further agrees that notes, drafts, or acceptances given are not to be considered as payments until they are paid.

In case payment is divided, to be made as follows:

Ship to Underwood Veneer Co. At Wausau, Wis.

Via Best Route

When When instructed.

It is agreed that title to the property mentioned above shall remain in the consignor until fully paid for in cash, and that in case of rejection, consignee will promptly deliver it to consignor F.O.B. point of shipment, and that this contract is not modified or added to by any agreement not expressly stated herein, and that a retention of the property forwarded, after thirty days after date of shipment, shall constitute a trial and a coeptance, be a conclusive admission of the truth of all representations made by or for the consignor and void all its contracts of warranty express or implied. It is further agreed that the purchaser shall keep the property fully insured for the benefit of The Fader Machinery Company, Inc., having policy indorsed 'payable to the Fader Machinery shall not become a fixture to any realty on account of being annexed thereto.

Underwood Veneer Co., By O. C. Lemke, Pres.

Sold by
A. L. Fader,
Salesman for
The Fader Machinery Company, Inc.,
Subject to acceptance at the Main office,
549 West Washington Boulevard,
Chicago, Ill."

Fader testified that before the foregoing order was signed he told

Mr. Lemke that "we shall try to put this over with our principals."

This statement was corroborated by Charles A. Green, vice president
and treasurer of the Fader Machinery Co., who stated that defendant

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The Fader Machinery Compant, Inn.,
Bubject to acceptance at the eil of ice,
549 West Washington Houleverd,
Chicero, Ill."

Pader testified that blore weller cin order sed in a tell-Mr. Lemke that "we shall the to put who over while our joinstplas." This statement was corroboreded by Charles I. Green, who provide nt and treasurer of the Mader Machinery does, who out they cofendant was induced to undertake the submission of plaintiff's offer through the intimation of plaintiff's president that he himself would go to Kokemo and select additional equipment to make up a carload shipment.

April 25, 1933, Fader telegraphed plaintiff that his principal would not permit shipment except on the usual used machinery terms of one-third with orders, balance draft attached to bill of lading, f.o.b. Kokomo. This telegram was followed by a letter to the same effect. The following day plaintiff wrote defendant that its president, Mr. Lemke, would be in Chicago within a week's time and take up with defendant personally the matter of the Sheridan veneer cutter. However, Mr. Lemke never called on defendant to discuss the matter. May 2, 1933, the Noble Machine Co. offered an 80" cutter to plaintiff for \$1,750. About a week later, May 9, plaintiff wrote defendant to arrange to forward the cutter, stating that the matter had been delayed, subject to the "writer's visit to the factory at Kokomo," and the selection of other machinery in addition to the cutter.

Negotiations between the parties were thereafter held in abeyence until June 8, 1933, when defendant received a letter from plaintiff's attorney, commenting on the correspondence had between the parties, and stating that plaintiff refused to change the contract. Plaintiff evidently made no further effort to buy the identical cutter from the Noble Machine Co., or a like machine elsewhere, until July 27, 1933, when it purchased direct from the manufacturer a new 75" veneer cutter for \$2,800. In addition to the purchase price plaintiff paid the freight charges from New York to Wausau, amounting to \$204, and August 3, 1933, purchased a new motor and a coessories for \$118. Plaintiff thus expended \$2,800 for the cutter, \$204 freight, \$118 for a new motor, aggregating \$3,122. From this total there was deducted the contract price of

was induced to uncertake the abstacl of line 15 to off through the indimetion of placeholder product the indimetion of placeholder product to Kokomo and select additional equipment to mir to a carload shipment.

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April 25, 1855, Faces telegraphed claimtiff that the principal would not permit digment except on the wealth of machinery terms of one-third white orders, believe soft attacks to bill of ladin, f.e.b. Jokore, white telegram a followed by allotter to the same wifeet. The following cay laintiff whote defendant that its president, as, bonke, rould be in this or differ a week's time and take up with wolf normally the interpretar of the Sheridan veneer outses. However, the defendant to discuss the matter. New of the discuss the matter. New of the first continuation of ended an 80" outset to plaintiff and of case and the context of the later, may 9, plaintiff wrote defendant to arrange to the weight of the factory of local delayed, subject to the option states is visit to the factory of locales, and the aelection of context subject to the option when machinery in addition to the order machinery in addition to the order.

Mogotiations between the parties ero threatfur hand in abeyence until June 3, 1830, when i find not required a letter from plaintiff's atterney, commenting on the correspondence had better the parties, and stating that the thinties refused to a state contract. Plaintiff orthography made no farther of a state the thinties outled the hole fashine and a state the light of the fashine and the loads fashine and the latter than the loads fashine and the latter than the loads fashine and the latter and and the latter for the purchase price plainties gott the first the fashing to \$200, and latter that the course of the latter than the motor and accessories for 118, finding that the course of the latter than the course of the cou

\$1,250, leaving \$1,872, from which the court deducted the freight charges that would have been incurred in shipping the old cutter to Wausau, leaving a balance of \$1,807, which was asvessed as plaintiff's damages. Judgment was entered for that amount and costs.

Defendant interposed a twefold theory of defense (1) that there was no contract, and (2) that if there was a contract and a breach thereof the court erroneously determined the measure of damages. With reference to the first proposition it is urged that the written instrument sued on was merely a proposal, or an offer to buy, and subject to acceptance by defendant at its main office in Chicago: that it was at best a unilateral contract which would net be binding on the seller until it was accepted; that it never was accepted by defendant and therefore never ripened into a binding contract between the parties. To support this contention defendant relies on certain fundamental rules of contract and decisions holding that the burden of proof to establish a contract of purchase and sale is on the party seeking to enforce it; that an offer to buy is not binding until accepted by the seller; that a contract by which one party agrees to buy, but the other does not agree to sell, is unilateral, and cannot be enforced; and that there can be no bargain unless an offer is accepted unconditionally o In arguing these various propositions defendent characterizes the written instrument upon which plaintiff's claim is based as a mere memorandum of terms and conditions upon which plaintiff had invited defendant to deal with it, and points out that the form used was obviously not appropriate, either as an expression of the parties intentions or their agreement, for the following reasons: The written instrument contains provisions in the printed portions thereof which defendant's counsel says are utterly inconsistent with any theory of final purchase and sale. In one portion of the

Defendant interposed o thoself theorems of desenguethi that there was no contract, and (2) that if there was a contract and a breach thereof the court error ously & tendined the rousere of tank begrust i moitirequie forth of of comerator all. damages. the written incirument sued on the merely a proposal, or in offer to buy, and subject to asceptance by defendent of its main office bleo. Hoid. Josephoo fan teligu a teed te dew it ight ; ogsoid? mi never it that the time at little antill the continue of the action wis accepted by defendent and therefore never mit and into a linding contract between the perties. To up out this cantingian bus to miner is notice that mentabute nistree no soiler tumbnoles decimions holding that the burd as of province withhild a contract no that til sonothe of mineral weard out no the shee bas sasdarug To offer to buy is not binding andla. Alson grabbed son at gud of rello contract by which one ye by agree, to bur, but the other coes not agree to sell, is unilateral, an come of D and record and the there can be no bergain unless on fir the cooplet union it oughly, In arguing those various proposition: within at a cust mizes the elem a lo bal de l'ini la d'hillab L de di negu tremurtant mettir hostimal out in that well room modifies bee amust to mubinatomom the or wine in Jill two tring his within fresh of transfes obviously not appropriate, of the mean permiton and an election intentions or their saverage, to the followin or empirios written instrument continuous ori to oring print sportlens thereof which defeatent! come a same to the Lotte the

with any theory of time i purchase one sale. In one portion of the

document plaintiff agrees to pay on delivery in good condition; in another it provides that the purchaser agrees to make settlement within thirty days after date of shipment, and then, to evidence all payment due defendent at a later date, by notes bearing date of shipment and interest. It is also pointed out that the instrument provides for rejection by consignee, and that a retention of the property for more than thirty days after shipment shall constitute a trial and acceptance and be a conclusive admission of the truth of all representations made. It is difficult, indeed, to reconcile these various provisions with plaintiff's theory that this transaction constituted a completed purchase and sale.

At the close of plaintiff's case the trial court was evidently inclined to hold with defendant that the document was simply a unilateral contract, but after considerable discussion the court adopted the theory that A. L. Fader, as president of defendant company, orally accepted the proposal and thereby complied with the provision in the written instrument which made the sale "subject to acceptance at the main office, 549 West Washington Blvd., Chicago, Illinois. We think this conclusion is not warranted by the record. Subsequent negotiations between the parties, as disclosed by their correspondence, indicates that there was never an acceptance by defendant. Plaintiff seeks to minimize the provision in the written instrument which makes the proposal "subject to acceptance, etc.," by arguing that this was no part of the contract itself but merely a printed memorandum following plaintiff's signature, and therefore not binding. We are not impressed with that contention, however, for the following reasons: Defendant was not the owner of the Sheridan veneer cutter. That piece of machinery was located in the factory of Davis Industries, Kokomo, Indiana, which was then in liquidation, and it appears from the evidence that document plaintiff agrees to pay on a liver in good on lition; in another it provides that the purchased egroes so make stilement within thirty days after date of shipment, and then, to evid noe all payment due defendent it a lit of date, by notes bearing ste of chipment and interest. It is also pointed out that the instrument provides for rejection by consignee, and that a retention of the property for more than thirty days after highest highest chall constitute a trial and acceptance and be a constanty admiration of the truth of all representations made. It is in it is indeed, the transaction constituted a campleted pushes the indeed, this transaction constituted a campleted pushes and rate.

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Eachine Co., at Kokomo, which had quoted a price thereon to plaintiff, and the Fader Machine Co., defendant. Moreover, defendant had other salesmen, any one of whom might have disposed of the machine pending these negotiations. Under the circumstances it was essential for the protection of defendant to ascertain if the machine had not been previously sold pending the negotiations with plaintiff at Wausau, and it was not unreasonable for defendant to protect itself by the condition inserted in the written document against any liability that might arise from the sale of the machine by Noble Machine Co. or one of defendant's other salesmen pending the negotiations.

The written document also contains the memorandum "Sold by A. L. Fader, Salesman for the Fader Machinery Co., Inc.," and counsel for plaintiff argue that this indicates a completed sale. Evidently the court also entertained that view, as indicated by an expression that the words were inducive, if not determinative, of the question whether or not the instrument represented a completed sale. A similar situation arose in the case of Smith v. Weaver, 90 Ill. 392, wherein defendant signed the following written memorandum contained in plaintiff's firm books: "Sold this day, N. Weaver, a bill of lumber, to complete a house for himself, * * *. * With reference to this memorandum the court said that it was not a contract of sale but a mere offer made by the defendant to let plaintiff have lumber at certain specified prices which might be revoked at any time before delivery or at least at any time before the offer had been accepted by plaintiff. "It is true, the word 'sold' is used in the instrument; but, then, the whole instrument must be construed together. When this is done, it is plain there is no valid contract to bind anyone." In Bayfield v. Defenbacher, et lenst to sono rous et styin to i o o i., the sells liachine Co., "to skemo, which had custed of the Toder rechine Co., defendent, Moreover, phaintiff, and the Toder rechine it., defendent had other aclasmen, any one of shom might have discosed of the machine pending these regotimicars. Under the olicanstances it was essential for the protectation of defendent to escert in if the machine had not been previously cole pending the negotimities with plainties at the sansan, and it was not unrocconcible for defendent to protect itself by the condition in art did the tritten socument to protect itself by the condition in art did the tritten socument to protect itself by the condition in art did the achine conditions and hashine do. or one of definition of the achemen pending the negotiations.

The written document also contains the manage noun "bold by A. L. Pader, Palesmen for the Reder M chiang one, Inc.," and courself for plaintill ergu that this in ic tes completed as lo. Evidently the court also madradas that view, indicated by an compression that the words and industry, if you a smingliful, of the question whether or not the institution of the a completed sale. A similar althablon on hith color of the aglime A .olse -osen nertina gra office out bangle on on Tob miorest geet . If Ce of the cartained and plant that the capta control of the captains and the Wesver, a bill of lumber, so complete and not him als * * Ton the first that the court with memorian eight of somether with a contract of sale but a mean of our made by the defence at to let of in he whit, sooking by history make to to modern a filthining revoked at any time bluor helivery or at last the may time before the effer had been accepted by plaintiff', "It is true, the tord 'sold' is used in the instrament; but, then, the hole in trument must be construed tow there her this is done, it is plain there greeke da. in . v bisity in the energy of the ot souther of all

266 Ill. App. 385, we held under circumstances that were analogous in principle that words similar in effect to "sold by" constituted a mere attempt to effect a sale, and cited Smith v. Weaver, supra, in support of the conclusion there reached.

The correspondence in evidence indicates that there was always some uncertainty about the consummation of this transaction. April 26, 1933, Fader telegraphed plaintiff that his principal would not permit shipment except on the usual used machinery terms of one-third payment with orders, balance draft attached to bill of lading, f.o.b. Kokomo, and this telegram was followed by a letter to the same effect, which plaintiff answered by stating that its president, Mr. Lemke, would be in Chicago within a week's time to take up personally with defendant the matter of the cutter. Mr. Lemke never called on defendant to discuss the matter. 1933, plaintiff's attorneys advised defendant that the matter had been placed with them for attention. This correspondence apparently terminated the negotiations and resulted in the purchase of the me w machine by plaintiff. After careful consideration we have reached the conclusion that the instrument sued on cannot be construed as a binding contract of purchase and sale, but is, as the trial court in the first instance characterized it, a unilateral agreement subject to acceptance by defendant; that defendant never did accept the proposal unconditionally, principally because of differences as/terms of payment, and that as a result of these differences defendant declined to accept the offer or proposal and no agreement was reached upon which an action could be predicated. This is substantiated by Lemke's letter to Fader of April 26, and the events that followed.

The remaining question relates to the measure of damages.

m re the execution of the man of the control of the allways ome uncertainty sou in a man it is the training appropriate April 26, 1965, field to tel trouble? of their tele his original culd To charat wishinger a lu Erasa bil no squame inompide timetor ton one-third payment it is orders, ballance of tethern to till of lading, f.o.b. Mokomo, and this telegren was felle of by a latter to the same effect, which plaintiff youremed by at ting the its president, Mr. Lonke, would be in the to the three to take up personally with defendent the motion of the entire. Wr. Lenke never colled on a fidewicht to fill and the assistant I want, 1933, plaintif's automore woyled inf attact the mitter led been placed with them for attintion. This solve pondenc agree atly . Start to say the man of the safet of the collections and betanisment being by and the and control of the same and a filterial by the control of the conclusion the the like in the conclusion of the mission of binding contract of purch can order but any an the bill cours in the first instance olerasterized it; a unil that agreen ut utopocon ble tower thebroles t Hi time heales ye sometogeose of toot the proposal acconditionally, privily on the order of the const as/terms of payment, and that as a sealt of the continue of then or the first country to relie out the or beniloss inconsistent was reached upon thich en action balf be po into. . The is substantiated by Temice's litter to Fider of ["] : (, one the eventa that follo ed.

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In view of our conclusion as to the first defense, this question becomes unimportant. It is clear, however, that plaintiff utterly failed to prove damages under the provisions of paregraphs 2 and 3, sec. 67, chap. 121a, Uniform Sales act (Illinois State Bar Stats., 1935), and in accordance with the well recognized rules governing cases of this character. It relies on the assertion that there was only one used machine to be had and that one had already been sold to plaintiff. This is not borne out by the There was no effort made to ascertain whether there were other machines available or the market value of a like article, and without such proof the court had no basis to afford an assessment of damages. To permit recovery on the difference between the value of a new cutter and the quoted price of the one in question, without specific proof that no other used cutter could be purchased, was error. It follows from what we have said that the judgment of the circuit court should be reversed, and it is so ordered.

REVERSED.

Sullivan, P. J., and Scanlan, J., concurs

In view of our conclusion as to the all the first the state of our conclusion as to the all the state of the becomes unimportant. I. is clear, however, incl. i witerly falled to prove demages unit; the provision of the first 3, sec. of, chap. 121a, Unit of the are (filtunity for the water broder on ofests, 1835), end in accordance with the will governing cases of this about the Table and Commercial that there was only one need thing to be had an it the had already been sold to claimited. This come of horre of the evidence. There were no experienced to the local on sew ered? . sonebive were other machines aveil ble or the well as a continuous state. and without such magor the course and are but to the come of the ment of damages. To pormit reserving on the 1 on mee actioen the value of a new sutter and the set of the entitle and the entited without specific prest thre no oth as a cuts a coul be purch sed, transport the fall for the confer to the fall of the form asset of the circuit court should be neverted, and it is so ordered. A MAN TO A

Sullivan, F. J., and cenlan, J., consur.

38865

ELMER C. HUEBNER. Appellee,

GOLDBLATT BROS., Inc., and HENRY MERIK. Appellants.

APPEAL FROM CIRCUIT COURT. COOK COUNTY.

287 I.A. 630°

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff was injured by a tractor owned by Goldblatt Bros., Inc., and driven by its employes, Henry Merik. In an action on the case brought by plaintiff to recover damages for the injuries sustained, the jury returned a verdict in his favor for \$3,000. Defendants' motion for a new trial and for judgment non obstante veredicto were overruled, judgment was entered on the verdict, and this appeal followed.

The complaint consisted of two counts, the first charging defendants with negligence, and the second with wilful and wanton conduct. - The second count was withdrawn pursuant to leave of court before the jury retired, leaving the question of negligenes as the only issue submitted to the jury.

It appears from the evidence that April 26, 1934, defendant Henry Merik was driving a tractor belonging to his employer, Goldblatt Bros., Inc., in a northerly direction on Damen avenue, and when he reached 35th street the motor stalled on the eastbound car track, for lack of gasoline. Merik got out and attempted to push the tractor off the street intersection, but could not do so alone. Plaintiff was standing on the northeast corner of 35th street and

ELLER C. HUNDMEN, Appellee,

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GOLDBIATT BROS., Inc., and HEWRY WATER, Appellants.

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MA TUSTIC HARM DELIVED BY THE TOTAL TO A POLICE.

Plaintiff was injured by a tractor on a by Coleblatt Bros., Inc., and drives by its exployer, heavy early, In an action on the case brought by plaintiff so account amongs for the injuries sustained, the fury resumed a vertical in his fuvor for \$3,000. Deficients movies for a less suit for judgment non obstante verseigte were everraled, judgment was entered on the verdict, and this appeal followed.

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Damen avenue, talking to one Charles Koestner. Merik testified that Huebner came over, inquired what had happened, and when told that the tractor had run out of gas Huebner suggested that he would assist in pushing the tractor off the car track. Huebner, on the other hand, testified that Merik asked his assistance. At any rate, the two men proceeded to push the tractor from the intersection. Merik stood on the west side of the tractor, with one hand on the back of the cab, and plaintiff stood on the right hand or east side, likewise pushing against the back of the cab. They pushed the tractor along for several feet, and, in the process of doing so, plaintiff's left foot got under the right rear wheel of the tractor, injuring him.

so far as defendants' liability is concerned it would make no difference, in determining the relationship of the parties, whether plaintiff volunteered his assistance to Merik or whether the latter asked plaintiff for help. In either event plaintiff was under no obligation to assist, and therefore his services were necessarily voluntary. In helping Merik, he was, of course, obliged to exercise due care and caution for his own safety. Before the trial plaintiff made a deposition, under the Civil Practice act, wherein he related the following circumstances leading up to the accident.

N. No. Q. How did you happen to slip? A. I can't say.

pavement?

A. Why this here caught my foot when I slipped.

On the trial plaintiff's evidence differed slightly from that given by deposition. He there stated that Merik said "Come on, give me a hand;" that he inquired if Merik was out of gas and the latter replied that he was and then said to plaintiff, "Grab

[&]quot;Q. Did he tell you what to do or did you tell him what to do at that time?

Q. Well, when you were pushing the truck you say you slipped and then the back wheel went over your foot, is that correct? A. Well, yes, sir.
Q. When you slipped did you fall right down on the

Lemen avenue, talking to on the less loss out, here to iff that that Huebner came over, he wire that that the tractor has an end of growing. In the day, he would assist in pushing the tractor off of the control of the other hand, tashiff that half the other hand, tashiff the life has the control of the two men procefor to make the tractor from the intersection. Marik atond on the half of the control of the tractor along for several fact, and, in the process of doing so, plaintiff's life out for that the tractor along for several fact, and, in the process of doing so, plaintiff's life out for the tractor, injury for several fact, and, in the process of doing so, plaintiff's life out for the tractor, injury for several fact, and, in the process of the tractor, injury fact, and to the right rest

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[&]quot;Q. Did he tall you what to do or all ou la hir hat to do at that time?

N. No.

Q. How did you happen to whip? A. I out say.
Q. all, here we are gradier the trek out, you slipped and them the back wheel went over your root, is that correct? A. 'all, yes, alr.
Q. alon you alipped did, on full right do a on the pavement?

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On the trial plaintiff's evidence differentially from that given by deposition. In these at too that which will be come on, give me a hand; " that he impaired at lattice as out of gos and

hold on the other side there," pointing to the right side of
the tractor; that when Merik got hold on the left, or west side
of the truck, plaintiff took it for granted that Merik wanted
him to take hold on the opposite side, and he did so accordingly;
that they both started pushing; and "I guess the truck was going
about ten feet and I was ready to let loose when something grabbed
my foot." On cross-examination, plaintiff testified that he was
several feet from the back end of the cab; that Merik started
pushing on one side and he (plaintiff) started pushing on the
other; that he did not remember slipping, and when asked "How
did your foot get under the back wheel?" he answered "I don't
know."

The circumstances under which plaintiff's foot was caught under the rear wheel of the tractor are probably best indicated by his own evidence on cross-examination, as follows:

"The first thing I noticed out of order was that my left foot was under the rear wheel. The truck was in motion. I was going to walk away. The cab was still moving and I was walking along with it.

Q. And while you were walking along with the tractor, you say the right rear wheel of the tractor came up onto your left foot?

A. Yes, sir.
Q. Is that the way it happened? A. That is the way it happened.

The only other witnesses for plaintiff were Charles Koestner and two girls, Shirley Kramer and Rachel Mann, all of whom testified to the events leading up to the accident, but they throw no further light on the exact manner in which plaintiff was injured.

Megligence is the failure to use ordinary care. As applicable to plaintiff's conduct, it is immaterial whether he slipped on the pavement, causing his foot to get under the moving wheel of the tractor, or whether through inattention or inadvertence he allowed his foot to get under the wheel. In either event Merik was not responsible for the immediate injury. On the question of defend-

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the tractor; the when W rik sot held on the hoft, ow set the
of the truck, pleintiff took it for greates and Medik Lanted
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auts' negligence, plaintiff seems to rely on the following circumstance: After the tractor had been pushed about ten feet and plaintiff was about ready to let go, he said that "something grabbed my foot, and I looked around, like that, and at that I heard Charlie yell, 'hold it,' and at that I felt it go over and everything got black in front of me." Plaintiff's counsel argues that after Koestner yelled, "hold it," Merik gave an additional push, but according to plaintiff's own testimony the wheel of the tractor passed over his foot almost simultaneously with Koestner's call to "held it." The exact manner in which this accident happened is unexplained. The right rear wheel of the tractor passed over plaintiff's left foot. There is nothing in the record to indicate that Merik did anything that he should not have done, or that he failed to do something which he should have done. From a careful examination of the record it clearly appears that plaintiff was not injured through the negligence of Merik. The rule is clear that in order to recover plaintiff must prove negligence as charged in his complaint, and must also show that he was in the exercise of due care and caution for his own safety. He failed to prove his case and therefore he cannot recover.

In view of what we have said, the court should either have taken the case from the jury or allowed defendants, motion for judgment non obstante veredicto. It is unfortunate that plaintiff was injured but he cannot recover on the facts in this case, and it would therefore serve no useful purpose to remand the case for a new trial. Accordingly, the judgment of the circuit court is reversed.

REVERSED.

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KEYE aud.

Sulliven, P. J., and centen, J., concur.

38874

THE FIRST NATIONAL BANK OF CHICAGO, Appellant,

V .

JOHN KOSTAKIS et al., Defendants below.

JAMES N. NICHOLS,

Appellee.

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APPEAL FROM CIRCUIT COURT, COOK COUNTY.

287 I.A. 631

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The First National Bank of Chicago brought suit against James N. Nichols, John Kostakis, John Vasilopoulos and John T. Argiris, upon four Principal promissory notes each of which purports on its back to be guaranteed by these defendants. Only Vasilopoulos and James N. Nichols were served; the former defaulted. Nichols pleaded to the declaration and trial being had by jury a verdict was returned in favor of Nichols and judgment entered thereon. This appeal followed.

Defendants and others purchased various parcels of improved real estate at the southwest corner of 86th street and Ashland avenue, Chicago, which was subject to a \$50,000 mortgage. Title was taken in the name of Washington Park National Bank, as trustee for the benefit of the purchasers, under a declaration of trust reciting that the trustee was to hold title for the ultimate use and benefit of the defendants and others as beneficiaries, and that the trustee should deal with the property only as and when directed so to do in writing by the four individual beneficiaries who were made defendants to this proceeding. Washington Park National Bank took

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JAMES N. MICHOLE.

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Defendants and the search to the formant of soin good, of increved to all estate at the seathwest perman of soth street and rilead treams, Chicago, which was subject to a \$50, 0 mortange, with any taken in the seme of suchination and of though lank, of trusted the taken in the purchasers, under a declar tion of trust of the trusted van to held title for the ultimate are and built that the defendants and oftens on bonefici rice, and that the fire formation of the defendants and oftens on bonefici rice, and that the fire formation of the deal with the property only as and when direct and one and anith the property only as and when direct and one of the aritimate by the four individual bandied rice and an order.

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\$50,000 mortgage was held by the Washington Park National Bank. For the purpose of paying up this incumbrance defendants secured a loan of \$50,000 on the property from the First National Bank of Chicago. To consummate the loan defendants appeared at the bank with another beneficiary, and for the purpose of executing the guarantees required by the bank they each signed their name on the back of the several notes. Above their signatures appears the following rubber stamp legend:

"For value received we hereby guarantee the payment of the within note at maturity or at any time thereafter, waiving demand, notice of nonpayment and protest."

The notes are all the same, except as to amount, and read as follows:

"Chicago, Illinois, March 1, A. D. 1928.

On or before five years after date, for value received, Washington Park National Bank, a corporation, not personally but as Trustee under * * * Trust Number 23, hereby promises out of that portion of the Trust Estate subject to said Trust Agreement specifically described in the Trust Deed given to secure the payment hereof, to pay to bearer, * * * the principal sum of * * * Dollars, * * * with interest thereon payable in the same manner as said principal sum * * * at the rate of six per centum per annum, payable * * * on the first day of March and September in each year until maturity, and with interest-after maturity until paid at the highest rate for which it is now in such case lawful to contract; * * *.

This note is executed by Washington Park National Bank of Chicago, not personally, but as trustee as aforesaid * * *, and is payable only out of the property specifically described in said Trust Deed securing the payment hereof, * * *. No personal liability shall be asserted or be enforceable against the promissor or any person interested beneficially or otherwise in said property * * *, or in the property or funds at any time subject to said Trust Agreement because or in respect of this note, or the making, issue or transfer thereof, all such liability, if any, being expressly waived by each taker and holder hereof, but nothing herein contained shall modify or discharge the personal liability expressly assumed by the guarantors hereof and each original and successive holder * * accepts the same upon the express condition * * * that in case of default in the payment of this note or of any installment of interest, the sole remedy of the holder hereof or of any of the interest coupons * * * shall be by foreclosure of the said Trust Deed * * * or by action to enforce the personal liability of the guarantors hereof or both.

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This note is excepted by satisform with a tion 2 and of Chicago, not personal, , bar what he as a command of and is payable only out of the parable only out of the personal liability shall be a control to the personal liability shall be a control to the promiseor or my personal liability is and the property of the property of the property of the property of the said from the property of the making, the property of the making of the property of the property of the personal liability of the property of the making of the payable of the making of the payable of the making of the payable of the personal of the payable of the personal liability of the payable of the personal of the personal of the personal liability of the making of the makin

The sole issue of fact presented to the jury was whether these notes bore the rubber stamp legend of guarantee at the time defendants affixed their signatures. The affidavit of defense interposed by Nicols averred that he was not indebted to plaintiff, that he did not guarantee the payment, that the words on the back of each note, preceding his signature, were not on or attached to any portion of the notes above his signature at the time he signed his name, that he affixed his signature to the notes as inderser and not as guarantor, that no presentment was made on him when the notes fell due, that they were not made for the accommodation of Nichols or the other defendants, and that no notice of dishonor was given him.

as the interest coupons attached thereto, were all signed at the same time and in the following order: "John Kostakis, James N. Nichols, John Vasilopoulos and John T. Argiris." All of the defendants and one other beneficiary testified that the rubber stamp legend did not appear on any of the notes at the time they signed. As against this defense, plaintiff produced the testimony of N. J. Frische, an employee in the loan department of the First National Bank, who testified that the stamped legend appeared on all the notes when defendants affixed their signatures. Upon this evidence the court submitted the issue to the jury under the following instruction offered by defendant Nichols:

"The Court instructs the jury that as a matter of law, if, after hearing the evidence, they believe the words of Guarantee were not endorsed on or upon the note or notes sued on in this case at the time of the endorsing of the same by the defendant, James N. Nichols, it is your duty to find the issues in favor of said defendant, James N. Nichols."

To sustain the judgment counsel for Nichols takes the position that plaintiff sued defendants as guaranters; that the sole issue of fact presented was whether the stamp of guarantee appeared The sole issue of the product of the color o

It is undisjuted that the rows printing all actor, as well as the interest compone attaches whereas, were all signed at the same time and in the following order: "John Mostakis, James and in the following order: "John Mostakis, James and and a dan v. Pairle." all of the defendents and one other baneflainty to attite the the thisses stamp legand did not appear on any of the notes of the thir time they signed. As against this defined, it in the testimany attend. As against this defined in the testimany of M. J. Wrische, on employer to it. I am depotent of the Wiret sational Bank, who bestief of the the test the notes when defendent affined that's the three. Then this the rows when defendent affined that's the town this following instruction exercice by attacks to the jury under the

To sustain the judgment counsel for dichols when the goadtion that plaintiff sued defendants as guaranters; that the ale issue of fact presented was shother the stong of a grantee appeared

[&]quot;The Court instructs the jury durt is notice of law, if, ifter hearing the visites, ducy believe the looks of hublites were not endorsed on or spen that note or not select on in this case at the time of the endorsias of the seme by the critical, during the Michele, it is your duty to lind the results in the volt of lind of ant. James 4. Alchols."

on the notes before defendants affixed their signatures thereto; that the jury by their verdict found in favor of defendants, and the case having been fairly tried the verdict of the jury and the judgment there on should not be disturbed.

Under ordinary circumstances we should be inclined to concur in defendants' contention, but we are convinced from the circumstances of this case, as disclosed by the record, that the verdict was contrary to the manifest weight of the evidence for the following reasons. These notes were made by a trustee and were so drawn as to expressly relieve the trustee from all personal liability and to require the holder thereof to look solely to the trust property for payment. The First National Bank, therefore, evidently deemed it necessary to require additional security, and defendants by their signatures were apparently willing to give the bank the additional personal security desired to secure the loan. Consequently the notes were drawn in the form of guaranties providing that "nothing herein contained shall modify or discharge the personal liability expressly assumed by the guarantors hereof. " The notes further provided that each holder thereof accepted upon the express condition that the sole remedy should be by foreclosure of the trust deed, "or by action to enforce the personal liability of the guaranters hereof, or both." This particular property was held by the trustee for the beneficiaries, including the four defendants, and the loan, which is evidenced by the notes here sued on, was made for the benefit of these parties, who had applied to the First National Bank for a loan sufficient to retire the existing mortgage on the property. They undoubtedly agreed to sign these notes, appeared at the bank for that purpose, and did, in fact, sign them, and it would have been absurd for the First National Bank to lend them \$50,000 on notes which expressly exempted the maker

on the notes be ore a real fill. That are at a set, and that the fury by that we will be not a winderts, and the case hering been fairly taked or a set of are graph a significant florecan chould not be due to be due.

Und ofthe relies there is a local boller of concur in defendants consecution, but a centile out in the circumstances of this are an electronic and reaches the to ep., it is a sill to differ mental to contract when the contract was a contract with the contract w the following recuons. There notes ere use by bna oothura were so drawn as to expres ly relieve the tracks of an all wereanal Liability and to recuire the action of the lend older to the trust property for payment. The tiret a bland Buth, theirfore, evidently deeme it aresterny to retire villional parity, and defendants by their wight but have a property will be dive the Dank the additional portion to the lear the lear. Consequently the notes one did a in the lore of the north providing that "nothing he in continued at it no ity or dicherge the personal liability expression on one by the promiting here of. " The notes funcher provided to be added the coff sayapter aron or section of the case the calcast the section of the section of the case of ytilidail lone, we all as one or relies yd to beet teat to of the guarantors hanof, or built." this problem property was held by the trante. .or the benealed des, including the four defendents, and the loan, Auton it licenced by the notes here not on, was male the the ten ilt of these point to the had a lief to Mirst national Bank for a loss a list at to ettro it culting mortgage on the projection that uncoubt divegree to in these notes, appeared at the balk for the purpose, and it, in furt, sign them, and it would have been brund for the Mirt Westonel Bank

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from personal liability without requiring some other security.

The language employed clearly indicates that these were notes
of guaranty and that when defendants signed they signed as
guarantors and not as indersers. To held otherwise would render
the language used in the instruments meaningless.

It has been generally held that any contract or paper is to be construed by all that it contains, and that "a bill or note, the same as any other written instrument, must be construed as a whole, so as to give effect to every part of it, if possible. The contract must be collected from the 'four corners' of the document, and no part of what appears there is to be excluded; and it has been suggested that, inasmuch as indersements are made on the back of a negotiable instrument, it may be said that the purport of the instrument is to be collected from the 'eight corners.'" (8 Corpus Juris, p. 85, sec. 136.)

Moreover, certain significant facts appear from the indorsements on the notes. It was stipulated by the parties that the original record of proceedings on the trial should be incorporated in the transcript of record filed in this court, and we therefore have before us the original notes as well as photostatic copies thereof. An examination of these instruments shows that the rubber stamp of guarantee was affixed on each note approximately three inches from the top, and the signatures of the four defendants followed closely thereunder. These signatures appear almost in the middle of the reverse wide of the instrument. Unless the stamp of guaranteee had appeared on the instrument prior to the time defendants signed these notes, it is difficult to understand why their signatures should uniformly appear so far down on the paper. Moreover, it clearly appears from an examination of the indorsements by the naked eye that on some of the notes part of the signature of John Kostakis, the first signer, is superimposed over the last

from perconal libility ished requiring or other colors. The language employed of ally ander to shad the total and that should of odent of adent of all all all and the target and not so incorners. To hold oth the total and the incorners are necknights meaningless.

It has been granupilly heleful the construct or page respect to be construed by all that it contribut, and the the bill or note, the same as any other witten in contract and the same as to give riter to every part of it, if costale. The contract must be collected to every part of it, if contract has been spread the first been less to be collected in the law and no part of that agreers the first been less that the contract and serve as the first contract and serve and the law and actions of the contract of the first contract and serve and the first contract and serve the contract of the first contract in the contract of the instrument is to be collected in the contract of the instrument is to be collected.

Moreover, end in right tent for apparation the anterest ments on the notes. It is a suightated by the probability that the original record of probability on the crist reade is an appeared in the transcript of heroes filled in this dum', the we therefore in the transcript of heroes filled in this dum', the we therefore have before us the original network and the copies thereof. An exemination of kiese instruments show that the rubion stamp of guernates are affixed on each nets appeared by three inches from the top, and the instruct of the four filles in the reverse the of the instruct oppear inches the reverse the of the instruct oppear inches alone the top and an area in the manualteer and appeared the instruction of the copies of the instrument. The transcribes are noted in the first and appears the instruction of the copies of t

by the naked eye that on come of the notes part of the sign ture of

line of the rubber stamp indorsement, and an examination of these signatures in relation to the stamp with a magnifying glass leaves no doubt thereof. The notes were submitted to the jury, and if they had looked at them these facts could not have escaped their attention. This evidence renders defendants' contention that the stamp was affixed after the notes were signed highly improbable, and taken together with the language employed in the notes and the position of the indorsements on the back of the notes, lends support to Frische's testimony that when the indorsements were made by defendants the stamp of guarantee had been affixed to each note.

The single instruction given by the court was clearly erroneous, because it failed to include some of the most important considerations in controversy bearing upon issue of fact, but plaintiff's counsel asked for no other instruction nor did they suggest any change in the one given. Other points urged for reversal need not be discussed in view of what has been said as to the facts of the case.

In view of the conclusions reached, we think it would amount to a miscarriage of justice to allow this verdict and judgment to stand. The loan was made for the benefit of defendants and they should not be acquitted of their obligation upon such a verdict as this. The judgment of the circuit court is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE RUMANDED.

Sullivan, P. J., and Scanlan, J., concur-

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Sullivan, P. J., and seamlan, J., concer.

38929

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error.

T.

PETER J. ALLEGRETTI,
Plaintiff in Error.

error to municipal court of chicago. 287 I.A. 6312

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Under an information filed in the Municipal court of Chicago by the People of the State of Illinois charging defendant with reckless driving, and pursuant to a trial before the court without a jury, defendant was found guilty of a violation of sec. 48 of the Uniform act regulating traffic (chap. 121, par. 323, Illinois State Bar Stats. 1935) and fined \$50 and costs. He seeks by this writ of error to reverse that judgment.

The information, filed October 4, 1935, charged that September 13, 1935, Peter J. Allegretti -

"did them and there operate a motor vehicle upon a public highway of this State situated within the corporate limits of the City of Chicago aforesaid in a wanton or reckless manner, showing an utter disregard for the safety of others under circumstances likely to cause great bodily injury and did thereby then and there cause an injury to another, to-wit: Harry Winsberg, which said injury did not result in death comtrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the People of the State of Illinois."

On the left hand margin of the information appears the following printed notation: "lst Count, Sec. 41B, M.V.L."

After several continuances the matter came on for hearing in the municipal court February 5, 1936. Defendant then made a motion to quash the information, which was entered and hearing

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PROPIL OF THE STATE OF LILLINGIS.

Defendant in Tracry

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MR. JURIS HE O TORRESS OF STREET VILLE SERVICE OF THE

Under an information liked in the Municipel lend of Chicago by the Paople of the State of Illinois on rein; infordant with reckless driving, and you ame to a tell before the court without a jury, defendent was sound will will be sound of the Uniform act regularies traine (chap. 1911, per. 323, Illinois State Sar State, 1995) and I'm. 10 and couts. He seeks by this writ of croot to reversible frequent.

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September 13, 1935, Peter J. Allegretii -

"did then and there operate a motor volida upon a public his state altuated which in ear, or to limit, of the way of this state altuated which in ear, or to limit, of the city of Chicogo amoresald in a content or a discrepance in an attentional content of the city of altuate and there cause an injury to a the part of the form of the factor of the form of the factor of the factor of the cause and distance in and a content of the peace and of attentional of the content of the peace and of attention of the content of the factor of

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After several continuences the mater one on so hearing in the municipal court from my 5, 1976, . A fonders such and the to quash the information, thich sat sites (), in ria.

thereon deferred. Later, the same date, defendant appeared in his own person as well as by counsel, and, after arraignment, pleaded not guilty to the charge in the information and waived trial by jury. The cause was then postponed and set for hearing, and tried February 8, 1936.

Some nine witnesses testified at the hearing, and from the evidence adduced it appears that at about 9:30 p. m., September 13, 1935, defendant was driving south on Independence boulevard, just north of where it intersects with Roosevelt road. This intersection is marked by stop and go signals. As he approached Roosevelt road the lights changed to amber and then green for east and west traffic. Another car had come to a stop before the intersection and defendant, who was evidently driving at a high rate of speed, could not stop his car in time, swerved to the left, struck the car ahead of him, ran up on the curb and injured one Harry Winsberg, a pedestrian, walking west on Roosevelt road on the sidewalk on the north side of the street. Numerous witnesses testified that defendant was driving his car at a speed varying from 40 to 70 miles an hour. Defendant denied this and stated that he was not driving in excess of 30 miles an hour, but that was a question of fact for the court to determine, and from a careful examination of the evidence we think the court was fully justified in finding that defendant was driving at a high rate of speed and recklessly.

As grounds for reversal it is first urged that the printed notation on the margin of the information indicated that defendant was charged with violation of sec. 41-B of the Motor Vehicle act, which had been repealed in July, 1935. Considerable space is devoted in defendant's brief to the argument that a person cannot be convicted on a statutory charge which has been repealed, either expressly or by implication, prior to the offense, and authorities

thereon deferred. Later, the same date, the same date, the arrel arms, his own person as well as by coursel, and, for arrel arms, pleaded not guilty to the oher with the dafers that a like a lived trial by jury. The course are sheet and tried behavery 8, 1936.

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are cited to sustain the contention. The state, by its counsel, says it is entirely in accord with these authorities, but insists that the small type abbreviations printed vertically on the left hand margin of the information is not a part of the charging part of the information, and we are entirely in accord with the state's position. The blanks on which informations are drawn in the municipal court are partly printed and notations on the margins are not part of the information. It is apparent from a reading of the information that defendant was charged with reckless driving in violation of sec. 48 of the Uniform act regulating traffic (sec. 48, par. 323, chap. 121, Ill. State Bar Stats., 1935) which reads as follows:

"Sec. 48. Reckless driving. (a) Any person who drives any vehicle with a wilful or a wanton disregard for the safety of persons or property is guilty of reckless driving.

(b) Every person convicted of reckless driving shall be punished upon a first conviction by imprisonment for a period of not less than 5 days nor more than 90 days, or by fine of not less than Ten Dollars (\$10.00) nor more than Five Hundred Dollars (\$500), or by both such fine and imprisonment, and on a second essequent conviction shall be punished by imprisonment for not less than 10 days nor more than 6 months, or by a fine of not less than One Hundred Dollars (\$100) nor more than One Thousand Dollars (\$1,000), or by both such fine and imprisonment."

He was tried under the foregoing statute and found guilty, and not for violation of sec. 41-B of the Motor Vehicle act as he contends.

It is next urged that the court erred in overruling defendant's motion to quash the information. It appears from the abstract that defendent pleaded not guilty before a ruling was made on his motion to quash, and in view of this fact he waived his right to raise the point on appeal. It was so held in Long v. People, 102 Ill. 331, wherein the court said - (p. 336)

"as to the motion to quash, it is not a rash presumption that all persons in the profession know that such a motion is waived by pleading to suit or action."

Also in Krueger v. People, 141 Ill. app. 510, the court characterized the roint as "purely technical, which could be taken advantage of,

are eited to suntian the contention. The state, by it counsel, says it is entirely in accord with these suchoribies, but the that the small type abbreviations printed ve violar, on the learn than anything printed of the on raing part of the chrometian, and we see ratirely in second the the tester position. The blenks on which informations or the see any incommission on the are partly printed such netations on the see incommission of the information that definition. It is apparent from a relianged of the information that definition that definition as the unition of the information of the Uniform act or only the testice and the violation of see. 48 of the Uniform act or only the testice (see 48, par. 323, chap. 121, 111, "test are the testice of the follows:

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you is hed upon a first conviction by inprisonment to parts of gunished upon a first conviction by inprisonment to parts of the test flow than 5 days nor more than 90 days, o by flat an another than Ten Pollars (\$10.00) nor more than Five Hundree Tellars (\$500), or by both such time and imprisonment, and consist of a count or subsequent conviction shall be partialed by Imprisonment for not loculess than 10 days nor more then 6 nonthe; or by a time of not loculess one Hundred Dollars (\$100) nor more than 3 nor finess than 10 days nor by both ough fine car ingrisonment."

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if at all, by motion to quash, which motion the defendant did not make, but pleaded not guilty and went to trial on the merits."

Moreover, inasmuch as a plea of not guilty had been entered by defendant and all the testimeny had been heard before a ruling was made on his motion, the hearing on the merits of the case, under the authorities, amounted to a denial of the motion.

(People v. Skolem, 244 Ill. 502.) In that case motion to quash was interposed, which the court took under advisement and thereafter heard and decided the case and entered final judgment without ruling on the motion. The Supreme court said that this amounted to a denial of the motion.

It is also urged that the information charging defendant was uncertain. We think it amply sets forth the charge of reckless driving under sec. 48, and that it fully apprised defendant of the charges preferred against him.

Lastly, it is urged that the trial court erred in not granting defendant a new trial, inasmuch as the judgment finding him guilty was against the manifest weight of the evidence and he was not proven guilty beyond a reasonable doubt. From a careful examination of the record we find that numerous with sees testified that defendant was driving at an excessive rate of speed in approaching an intersection marked by stop and go signals, and that his car was apparently not under control when the lights had changed, making it necessary for him to swerve out of the line of cars, strike the automobile immediately ahead of him and run onto the curb, where a pedestrian was injured. These circumstances, as related by the various witnesses, clearly indicate reckless and carless driving, and the court could not fairly have reached any other conclusion.

Finding no convincing reason for reversal the judgment of the municipal court is affirmed.

AFFIRMED.

Sullivan, P. J., and Scanlan, J., conour.

if at all, by motion to justs, which motion the extent diffunction but pleaded not fully out can to tried on the formation as a plead of not juilty had been entered by defendant and all the testiment had been heard before rolling was made on his motion, the proving on the merits of the case, under the authorities, amounted to a denial of the motion.

(People v. Sholem, 284 Til. 502.) In that case metion to just the material of the motion to just after heard and decided the case advinced advinced no there without after heard and decided the case of a terred that judgment without alter heard and decided the case of a terred that judgment without a valing on the motion. The upreme court old that that the series of the court of a donial of the motion.

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CHARLES WAS

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SADIE BENIK,

Appellant,

T.

WALTER BENIK and MARY BENIK, Appellees. 12

APPEAL FROM CIRCUIT COURT,

287 I.A. 6313

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

By this appeal Sadie Benik seeks to reverse an order of the circuit court dismissing for want of jurisdiction her petition to set aside the satisfaction of the judgment against defendants herein, which had been filed in the circuit court clerk's office without her knowledge or consent.

The undisputed facts are simple, though extraordinary.

Briefly stated plaintiff's petition and the supporting affidavits allege that plaintiff had obtained in the circuit court a tort judgment for \$10,000 against Walter and Mary Benik, in satisfaction of which the sheriff had on December 27, 1933, seized Mary Benik under a writ of capias ad satisfaciendum and committed her to the county jail, Walter Benik having previously left the state of Illinois. Defendants' attorney, Milton J. Sabath, procured her release the same day through an agreement by which she was to pay plaintiff \$25 weekly toward satisfaction of the judgment.

Payments aggregating \$1,425 were made and continued to December, 1935, and then ceased. Upon inquiry plaintiff learnedin December, 1935, that shortly prior thereto her attorney, Benjamin Vanderveld, without her knowledge or consent, had accepted from Milton J. Sabath,

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SADIA D'AIN,

Appellant,

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WALTER BEWIK and

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MR. JUSTICE PER MD DILLYS BOTH PENNING IN PARTICIPAL.

By this appeal bedie Benik becks to . Vrus un order of the circuit court dismissing for annual of juri circuit har petition to set colde the satisfaction of the jurament school court defendants herein, which had neen filed in the chronic court olders's office without her impeledge or consent.

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Peyments aggregating [1,415 were made and continu of the full mut.

1935, and then ceased. Upon inquiry plaintiff learnedin of mber, without her knowledge or consent, had accepted from Allton I. whereast.

representing Mary Benik, \$200 in full satisfaction of the unpaid balance of her judgment, then amounting to \$8,575, and delivered to Sabath a satisfaction piece which was filed in the circuit court clerk's office. Upon inquiry she further learned that Vanderveld had undergone a mental breakdown and had been confined in a sanitarium in Chicago and later sent to the Elgin state hospital for the insane. The information relating to the unauthorized satisfaction of her judgment had to be elicited from some of Vanderveld's former employees, necessitating a delay until March 31, 1936, when her petition and the necessary supporting affidavits were filed in the circuit court.

Defendants' answer, accompanied by a motion to strike the petition, takes the form of a demurrer. It does not deny any of the averments of the petition, but merely challenges the sufficiency thereof on the ground (1) that the court no longer had jurisdiction of the cause "pursuant to the statutes in such cases so made and provided," and (2) that plaintiff failed to act diligently in pursuing the relief sought. court dismissed the petition solely for lack of "jurisdiction of the subject matter and of the parties herein." We think it clearly was error to do so for the following reasons: The jurisdictional question applicable to this proceeding is not regulated by any statute; it is to be determined under the fundamental equitable principle, applied by courts from time immemorial, that jurisdiction will be exercised when it is properly invoked after term time to relieve a party from an injustice resulting from the fraudulent acts and

representing Mary Benik, 120% in full addefection of the unpaid balance of her judgment, then amounting to 8,575, and delivered to Scheth a retisfection piece which was filed in the circuit court elerk's effice. Usen in uity she further learned that Vanderveld had undergone a mental breakdown and had been confined in a semitarium in thicker and later sent to the light etate hospital for the ineque. The information relating to the unwalkerised at if action of her judgment had to be elicited iron some of Vercervelat. former employees, necessitating a dalay until along late, each when her petition and the necessary supporting afflic with sere filed in the circuit court.

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conduct of another. The allegations in the petition and affidavits indicate that a palpable fraud was committed on plaintiff, as a result of which the unpaid portion of her judgment against defendants, amounting to \$8,575, was settled for the nominal sum of \$200 without her knowledge or consent, through her attorney who evidently was not mentally responsible when the settlement was made. Whether Mary Benik and her attorney had any knowledge of Vanderveld's mental condition we are unable to say, but there is on file the uncontroverted affidavit of Walter Pacanowski, a clerk in Vanderveld's office from May 1, 1930, to June 15, 1935, sating that early in June, 1935, he called at the office of Milton J. Sabath, defendants' attorney, for the purpose of obtaining a \$25 check which was then due plaintiff, and at that time informed Sabath that Vanderveld was suffering from a mental and physical disorder and was no longer capable of properly conducting his business. Sabath takes the position that the settlement with Vanderveld was made upon the condition that plaintiff would be willing to accept the \$200 in settlement of her judgment and that, having failed to hear from Vanderveld. he assumed the settlement had been approved, and caused the satisfaction piece to be filed. Vanderveld, of course, cashed the check for \$200, and the proceeds were never turned over to plaintiff.

The early case of Miller v. Lane, 13 Ill. App. 648, is cited and relied on by plaintiff to support the contention that the court had ample jurisdiction to act. In that case plaintiff was the owner of a judgment and his attorney compromised the amount due on the judgment for a sum considerably less and delivered a satisfaction piece to defendants. More than thirty days after the satisfaction

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The early case of Miller V. Mane, 1: (11. 12. 0), is referred on by plaintiff to support the contention in the rount had emple jurisdiction to bet. In that case plaintiff to the land of a judgment and his them, recupromised the lands the of the judgment for a run considerably less and delivered as tieffectom piece to defendents. More than thirty days after the sailed at our

of judgment had been filed of record, plaintiff moved the court to vacate and set aside the satisfaction, which the court did on the ground that plaintiff's attorney had no power or authority to compromise the amount due for a lesser sum without specific authority from plaintiff.

In <u>Jenkins</u> v. <u>Merriweather</u>, 109 Ill. 647, it was held that law courts of record exercise the power to control their processes as long as the proceeding is <u>in fieri</u>, and that a court may, upon motion where proper ground is shown, withdraw and quash executions and other writs, and set aside sales of real estate before they ripen into titles, illustrating the general powers of courts to control their processes, after term.

In <u>Watson</u> v. <u>Reissig</u>, 24 Ill. 281, it was held that a court of law may exercise an equitable jurisdiction over the satisfaction of its own judgments and process. A right of redemption of a judgment debtor had there been levied upon and sold by virtue of another execution. On motion to set aside the satisfaction of judgment arising out of the levy, the court held it to be its duty to vacate the entry of satisfaction of judgment and issue another execution.

In Galway v. City of Chicago, 207 Ill. App. 304, a minor obtained judgment and her next friend assigned it to the attorney of record who collected the amount and filed a satisfaction of the judgment. Upon reaching her majority the minor filed suit in the municipal court alleging that her next friend had no power or authority to assign the judgment. It was held that the minor should have filed a proceeding in the court where the judgment was rendered, to vacate the order of satisfaction of judgment and amul the satisfaction piece, so that she could proceed with her suit on the judgment.

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We think the foregoing decisions are ample authority to sustain plaintiff's position, and defendants cite no cases in point to the contrary. It would, indeed, be a sad commentary on the power of courts to hold that the plaintiff who had been deprived of her rights through palpable fraud, resulting in the compromise of a valid judgment for a nominal sum without her knowledge or consent, had no redress because three months had elapsed. The mere statement of the facts alleged in the petition are sufficient to justify the court in assuming jurisdiction to set aside the satisfaction of the judgment.

The only other ground assigned for sustaining the court's order is that plaintiff did not act diligently. The court did not dismiss plaintiff's petition on this ground. Nevertheless, the contention may be answered briefly by saying that only three months had intervened between the time that plaintiff first learned of the satisfaction of her judgment and the date that her petition was filed. During this period her attorney, Vanderveld, was confined in various institutions and she could not get any information from him and had to investigate the facts through his former employees. This necessarily required some time, but it was not an unreasonable delay. To contend that this constituted a lack of diligence is absurd. The facts accounting for the delay are set forth in the petition and fully explain the period that intervened.

The order of the circuit court, denying plaintiff's motion to vacate and set aside the order satisfying plaintiff's judgment and annulling the satisfaction piece, is reversed with directions that the defendants be required to answer the petition that the cause proceed to a hearing upon the petition and answer.

REVERSED AND REMANDED WITH DIRECTIONS. Sullivan, P. J., and Scanlan, J., concur.

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CHARLES KALETA, Appellee,

ARCHER COAL AND MATERIAL

Appeal from

Municipal Court /

of Chicago.

287 I.A. 6314

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT:

Appellant.

in the municipal court upon one of a series of bonds issued by the defendant, Archer Coal and Material Co., and secured by a trust deed on improved real estate in Chicago. Attached to plaintiff's statement of claim was the bond, in the sum of \$500, on which the action was predicated, payable to the order of bearer, and due on August 1, 1932. Defendant's motion to strike plaintiff's statement of claim was denied, and thereupon defendant filed its affidavit of merits which was stricken on plaintiff's motion. An amended affidavit, subsequently filed by defendant, was likewise stricken, and, defendant having elected to stand thereby, judgment was entered for plaintiff, and this appeal followed.

The principal question presented for determination is whether a note or bond of this character is a negotiable instrument upon which an action at law can be predicated, and whether it is a distinct promise to pay money upon which recovery can be had by an a individual bondholder, without reference to and notwithstanding the provisions of the trust deed securing it. The note contains on its face the following provision:

"For a more particular description of the covenants of the party of the first part, as well as a description of the mortgaged property, and the nature and extent of the security, the rights of the holder of the bonds and the terms and conditions upon which the bonds are issued and secured, and the method of payment thereof, reference is made to said trust deed."

Defendant argues that by this provision the holder of the instrument is sufficiently apprised that a further collateral agreement exists,

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The principal cuestion proceeds for determination is underther a note or bond of this characters is a majoriable instrument upon which an action at law can be preside so, one should be a distinct promise to pay somey upon which recovery can be had by an aimilvidual bondholder, without reference to and notwithstancing the provisions of the trust deal securing in. The note contains on its face the following securing in.

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namely, the trust deed, which the owner is required to examine for a determination, not only of the nature and extent of the security but also of his rights as the holder of the bond and the terms and conditions upon which it was issued.

This question has frequently arisen on appeal (Continental National Bank & Trust Co. v. Chicago Builders Bldg. Co., 22 283 III. App. 64, 68; Chicago Title & Trust Co. v. Cohen, 284 III. App. 181, 191), and is fully discussed by the Supreme Court of Illinois in the case of Oswienza v. Wengler & Mandell, 358 III. 302. Plaintiff had there brought suit in the municipal court to recover the principal and interest due on four matured bonds of \$500 each, with interest. Under a stipulation of facts it appeared that the bonds contained on their face the following language:

"Said trust deed and this bond, as well as all the other bonds aforesaid, are to be taken and considered together as parts of one and the same contract. * * * Both principal and interest bear interest after maturity thereof at the rate of seven per cent. (7%) per annum and are payable in the manner described in the trust deed. * * * For a description of the mortgaged property and the nature and extent of the security, reference is made to said trust deed, to all of the provisions of which this bond and each coupon hereto attached are subject, with theseme effect as if said trust deed were herein fully set forth."

The trust deed under which the bonds were issued contained the provision that

"No action at law or in equity shall be brought by or on behalf of the holder or holders of any bonds or coupons, whether or not the same be past due, except by the trustee or by the requisite number of bondholders acting in concert under the provisions of this section for the benefit of all bondholders."

It was there argued that since the bond and trust deed were made at the same time and as part of the same transaction, the universal rule of construction of contracts requires that they be read and construed as constituting a single instrument. The court pointed out, however, that there is a well recognized exception to this rule in cases of mortgages and notes, and that a note or bond is a distinct promise to pay money and the pledge of real

namely, the trust deed, which the event is required to examine for a determination, not only of the nature and extent of the security but also of his righte as the hol er of the holo conditions whom which it was issued.

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estate to secure that promise is a different and distinct agreement, which ordinarily in newise affects the promise to pay but gives a further remedy for failure to carry out that promise. The rule is well settled that the holder of a mortgage has three remedies: (1) He may sue at law on the note; (2) foreclose, and (3) bring ejectment for the condition broken,—and that all of these remedies may be sought concurrently unless a restriction is found in the note or trust deed. (Rohrer v. Beatherage, 336 Ill. 450).

The question presented in Oswienza v. Wengler & Mandell, supra, was whether there was in the bond language which might reasonably be said to have incorporated therein by reference the "no action" clause of the trust deed and thus limited the holders' right to the provisions of the trust deed. The court, after eareful consideration of the provisions of the note and trust deed, held that, regardless of the question whether the bonds were negotiable, there was no language in the bonds which fairly included by reference the "no action" clause of the trust deed.

Plaintiff in this proceeding argues that notwithstanding the holding in the Oswienza v. Wengler & Mandell case, supra, the court inferentially held that incorporation by reference is valid and legal providing the language employed is distinct and unabbiguous. We concur in this conclusion, but in the instant case there appears to be no provision in the trust deed similar to the so-called "no action" clause found in the Oswienza case, and therefore even if we should hold that the language used in the bond here sued upon was sufficiently clear and unambiguous to incorporate by reference the provisions of the trust deed, we find nothing in the trust deed itself which would take from the holder of the bond his right to sue at law. Aside from the provision of the note hereinbefore quoted, which has reference to the trust deed, the bond in

estate to secure that provide is a different and all times appeared which ordinarily is nested affects the drawing to any and gives a further remedy for failure to dearly one that provide. The rule is well settled that the holder of a constance has three remedien: (1) He may sue at law on the note; (7) forselose, and (8) bring ejectment for the condition broken,—Law that all of these remedies ney be sought concurrently unless a restriction is found in the note or trust deed. (Rohrer v. Weatheren, 536 111, 450).

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question is an absolute, definite and unconditional promise to pay and as such plaintiff had a right to recover thereon unless there was some limitation in the trust deed to prevent him from so doing. We find no such limitation, and therefore plaintiff, as owner of the bond, had the right to sue at law, in addition to the security given to him under the provisions of the trust deed.

As an additional ground for reversal it is urged that seventy-five per cent of the bondholders had agreed to an extension of the indebtedness to August 1, 1939, and that plaintiff could not disregard this extension and sue on this bond within the extended period. (Meek v. Electrical Engineering Equipment Company, 282 Ill. App. 616, is cited to support this contention, but we do not think it is applicable to the facts here presented. In that case the sole question, as stated by the court, was whether plaintiff "had the right to accelerate the time of payment of the principal of the bond. Inasmuch as the bond upon which plaintiff sued in this proceeding had matured, the question of acceleration did not enter into the case. It is conceded, of course, that there was never an extension of the due date of this particular bond, and the mere fact that 75% in amount of all the bonds then outstanding consented to an extension could not affect plaintiff's rights. The provision relied on refers only to the status of the lien of the trust deed with reference to bonds extended, and is a provision ordinarily found in trust deeds to protect the lien and security of the trust deed for the benefit of these bondholders extending the maturity date of the obligations provided the required amounts enter into the extension agreement. So far as we can ascertain, it has never been held that such an

question is an absolute, definite and unconditional root e to pay and as such plaintiff had a right to recover thereon units, there was some limitation in the trust deed to prevent him from so coin. We find no such limitation, and therefore thin iff, as owner or the bond, had the right to sue at law, in andition to the security given to him under the provisions of the trust need.

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extension, although it preserved the lien and security of the trust deed for the benefit of the bondholders entering into the agreement, has the effect of extending the maturity date of the bonds whose owners have not entered into the contract.

Holding as we do that nothing contained in the note or trust deed herein deprived plaintiff of his right to sue at law on the bond, in addition to any other rights given him as a bond-holder under the trust deed, and that the extension agreement entered into by other bondholders was not binding on him, we think the Municipal Court properly entered judgment in plaintiff's favor, and the judgment is therefore affirmed.

AFFIRMED.

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MAX MAYRON, doing business as Max Mayron & Company, Appellee,

V .

IRWIN SCHULMAN et al.,
Appellants.

APPEAL FROM
INTERLOCUTORY INJUNCTION
OF CIRCUIT COURT, COCK

°2787 I.A. 632

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Defendants have appealed from an order of the circuit court denying their motion to dissolve an interlocutory injunction.

The complaint joining Irwin Schulman, J. W. Karsan, Ned Risenberg and Harry Spungin as defendants alleges, in substance, that plaintiff is and for some twelve years past has been engaged in the sale of clothing on the installment plan in Chicago; that he employed defendants as salesmen and gave them specific routes and territories for solicitation and supplied them with a list of customers for that purpose; that defendants each signed a contract of employment with plaintiff providing, among other things, that defendants would not for a period of three years after the termination of their employment "solicit, sell or attempt to solicit or sell, directly or indirectly, for themselves or for others, or do business in any mammer whatsoever with the customers apportioned to them on the installment route; " that plaintiff reposed trust and confidence in defendants as his employees and delivered to each of them a complete list or card index of his customers on the route assigned to them for solicitation; that notwithstanding the trust and confidence thus reposed in them by plaintiff, defendants betrayed same by making a complete list of plaintiff's customers

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MR. JUSTICA BRIUND DELIVE A THE CALLAGON OF THE COLLY.

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betrayed same by making a complete list of plaintists on tomers

in the respective territories apportioned to them, with the intent and purpose of using these lists for their own benefit; that in the course of the performance of their duties as salesmen, defendants obtained knowledge and information pertaining to these customers and now each has a complete list in his possession, taken from plaintiff's books and records; that they are now soliciting business and calling upon plaintiff's customers in violation of their contracts, as set forth in the complaint and in betrayal of the trust and confidence resposed in them by plaintiff during the period of their employment; that in soliciting customers, representations are made which lead them to believe that defendants and each of them are still working for plaintiff, and thereby defendants obtain contracts and business from plaintiff's customers which they turn over to his competitors.

On filing the complaint, due notice was served upon all the defendants, who appeared in court July 22, 1936, and after two continued hearings and arguments had before the court, defendants were granted leave to file their joint and several answer and on the same day the restraining order was entered. Thereafter, August 4, 1936, defendants appeared before another judge then filling an emergency assignment during the summer vacation, and moved for a dissolution of the restraining order. Arguments were heard by the court, based upon the allegations of the complaint and the averments of the answer, with supporting affidavits, resulting in the order denying defendants' motion to dissolve the injunction.

By their joint and several answer defendants neither admit nor deny that the written contract attached to the complaint was executed by defendants or any of them; they admit that they were employed by plaintiff as his solicitors; deny that plaintiff delivered to each of them a complete list or card index of his in the respective terrifories apportioned to them, ich the intent and purpose of usin; these lists for their co.d bun fit; this in the course of the performance of their duties as salesmen, within a betained knowledge and innorm than pertaining, o these calemers and now each has a complete list in his goases inn, taken from plaintiff's books and records; what they are now collection, business and calling upon plaintiff's calemetry in violation of their care tracts, as set forth in the compliant on the betregal of the trust and confidence responded in them by plaintiff, such a the pariod of their employment; that in solicitin suctous, recommended of them are made which lead them to believe that define attentions from are still working for laintiff, and the set of the coeh of ontracts and business from plaintiff's castons a high day turn over to his competitors.

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By their joint and several cases defend ats mither admit nor deny that the written contract stached to the complaint are executed by defendents or any of them; they armit that they were employed by plaintiff at his molisitor; fremy that plaintiff

delivered to each of them a complete list or sard index of his

alleged customers; deny that they were given specific routes. but state on the contrary that they were in a position to obtain business wherever it might be found; deny that they or any of them made a complete list, or any list, of plaintiff's customers; deny they are now soliciting business and calling upon plaintiff's customers and that the persons specifically mentioned in the complaint are customers of plaintiff; deny that defendants, or any of them, are soliciting business from any of the customers of plaintiff or that any of these customers are being called on by defendants "in any manner or form;" deny that defendants or any of them are soliciting the so-called customers of plaintiff or that they have led any of these so-called customers to believe that they are acting for or on behalf of plaintiff, deny that they made copies of the lists of plaintiff's customers or patrons, or carried away any of plaintiff's records, or that any of plaintiff's lists are being used in securing the patronage of plaintiff's customers.

After the averment and denial of the various matters hereinbefore set forth, the answer states that the contracts set forth in the complaint are vague, indefinite, insufficient and incapable of specific performance; that the so-called customers of plaintiff are not trade secrets within the contemplation of law, and therefore are not entitled to the protection of a court of equity; and that the negative covenants contained in the contracts are unfair, unduly oppressive and incapable of enforcement.

From the pleadings it appears that the complaint is founded upon the twofold theory that (1) defendants were violating a negative covenant contained in the contract; and (2) that, while employed by plaintiff and prior to the termination of their employment, defendants secured lists and records of plaintiff's customers for the purpose of solicitation, used the same in violation of their trust and turned the business thus obtained over to plaintiff's competitiors,

silegod customers; deny that they were iven prific route, but state on the contrary the chy ere in a wiston to obe ... business wherever it might be i une; dony this they or any of them made a complete list, or an list, or gith his contentry, deny they are now soliciting business and colling upon plaintiff customers and that the persons op sific lly montioned in the complaint are customers of plainting demy that cortain nts, or any of them, are soliciting business from any of the our comers of plaintiff or the tany of these customers are being collect on by defendmould to you so standard to test your "tered as admen you win at a ere soliciting the ac-oulled customers of plainting the above have led any of these so-called customers to believe the chey are acting for or on behalf of pleintiff, cemy this only more copies or the tiste of plaintiff's quetement or strong to easil of of plaintif's records, or thit my of plaintif's latter being used in securing the prtranage of plaintiff' ou, narra,

After the averment and senial of the verious at ters herebed and forth, the anguer states that the contracts set forth and the complaint are vague, indefinite, insurfacions and insurable of apecific performance; that the o-called constones of plaintiff are not trade secrets within the sentengelation of last, and therefore are not entitled to the protection of a court of early; and that the negative covenants contained in the amtracta and incapable of enforcement.

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for the purpose of destroying plaintiff's good will and business.

The first of these propositions, namely, that defendants were guilty of violating the negative covenant contained in the written agreement set forth in the complaint, was evidently considered only incidentally by the chancellor. The denial of the motion to dissolve was apparently based on the charges and allegation of facts made in the complaint and the denial thereof by defendants. A careful examination of the pleadings leads to the conclusion that plaintiff set forth a sufficient cause of action against defendants which, if taken to be true, would entitle him to a temporary restraining order pending the outcome of the litigation. Defendants' denial of the charges is no stronger than the assertions made by plaintiff. Under the circumstances it was not improvident for the court to issue the injunction and to refuse the motion to dissolve it, and thus preserve the status of the parties until a full hearing could be had. Since defendants categorically denied substantially all the charges made, we fail to see how they could be injured by a temporary restraining order. In determining whether a temporary injunction should issue and remain in force to protect a plaintiff's rights, the court will consider the relative injury that the parties may suffer. view of defendants' denial of the charges made, it seems evident that defendants will not be injured by allowing the injunction to stand, pending the outcome of the litigation. On the other hand, if the charges be taken as true, plaintiff would be irreparably damaged by a refusal of the court to preserve the status of the parties and allow defendants to continue their unfair practices and the impairment of the good will of his business. The duty of the chancellor under the circumstances is well settled. (Moroney v. Allman, 271 Ill. App. 336, 345-46; Baird v. Community

for the purpose of descroying plantists good all and bu esq. The first of these monor sions, a mely, this defend ... were suilty of viol time the a gative covernt contained in the written aprecuent set inth in the engline, were ever utly considered only indicant lly by the charaction. In ceniel of the motion to disactive vent up whith bilet on the shares the allogation of facts made in the larger that the variation by defendente. A careful exemination of the plottings local to the conclusion that glainfill bet apply to building tent no laufonce of sation against defendants which, is been so be been need entitle him to a temporery restraining order pending the occasion of the litigation. Jefendentu! calca of the charger and errouger than the assertions made by plaintiff. Theor the circum t pose it were not improvident for the source to its ab injustified on the region of the the motion to dispolve it, and thus press we sire a turn or the parties until a full hearing could be had. The a films asiting eategorically denied obtt met lig eil in en rese occe, et il to see how they could be injured by a tempor by a stratego are p. in determining the there a sumporary injunction to de is we a fully carrie and good of a title mining a jostory of solor of mismor consider the relative injury that the parties why will a name finally on some and any of self to Isinob 'ainship to raiv of molecularies and and a refer to the contract of the contrac atend, pending the outcome of the little fice. I it outcome hair, if the charged be taken as true, plan iff sould be irrepartite demaged by a refusel of the coult to priverity this to the and in the all we thent semilines to other and modern assistant said the implifuent of the file one, of the important off bus of the share llor under the circum tules in well this .

Moreney v. Illmen, on Till. pp. 14, oder 6; Tir v. boundit,

High School Dist., 304 Ill. 526, 529.) See, also, Daigger & Co.
v. Kraft, 281 Ill. App. 548, 553, where this court approved
issuance of preliminary injunction, without notice to defendants,
restraining use of plaintiff's customers lists by defendant.

Since the hearing evidently turned on the sufficiency of the bill, based upon the charges made, and the weight to be accorded the denial of defendants, it was proper for the court to deny the motion for dissolution of the injunction. The pleadings create issues of fact to be heard either by the court or a master, and pending that hearing plaintiff is entitled to the protection of a restraining order. For these reasons, the order of the circuit court is affirmed.

ORDER AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

Since the hearing set and the on the null of entry of the bill, based upon the object water, or the object to be accorded the denial of defendents, it was proper for the post of the parties of the parties of the for dissolution or the land of the land of the control of the test of heart of the above of the parties of the test of the parties of the test of the the parties of the the the the there are then reasons, the court is aftirmed.

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Sullivan, P. J., and :canlan, .., concur-

THE FIRST NATIONAL BANK OF CHICAGO, as Trustee, Appellant,

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MOSES BUSH et al., Appellees. APPEAL FROM CIRCUIT COURT, COOK COUNTY.

287 I.A. 6322

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff filed a bill to foreclose a trust deed given to secure three principal promissory notes aggregating \$18,000 upon which \$500 had been paid. A decree was entered finding that there was due complainant \$20,780.33, together with master's and solicitors' fees in the sum of \$600, and ordering that unless within three days from the date of the decree the amounts due complainant were paid the premises in question should be sold by the master in chancery at public auction for cash to the highest and best bidder. A sale was held in accordance with the terms of the decree and the property was sold to plaintiff for \$18,000. The master made a report that there was a deficiency of \$4,263.56 and recommended that execution issue against defendants Moses Bush and Dora Bush, who were personally liable for the debt. Thereafter the matter came before the chancellor upon a motion by plaintiff to approve the master's report of sale and for a deficiency decree. Defendants' solicitor offered to show by evidence that the property was worth not less than \$25,000 and thereupon the chancellor heard testimony, introduced by defendants and plaintiff, as to the value of the property. Edwin H. Manasse, called by defendants, stated

THE FIRST MATIONAL BANK OF CHICAGO, as Trustes, Appellant.

• V

MOSES BUSH et al., Appellees.

. COOK COURTY.

268 I.A. 682

MI. JUSTICE SCRATAM A LIVERLE THE CRISTON OF THE COURS.

Plaintiff filed a bill to foreclose a trust deed given to secure three principal promiseory notes egyregating 18,000 upon which (500 had been paid. A derec was sut and finding that there was due complainant (20,780.88, to other with me ter's and solicitors' fees in the was of 600, and ordering thet unless within three days from the date of the ducree the charts dus complainant were paid the promines in spection chould be sold by the master in chancery at outlie auction for cush to the highest and best bidder. A sale was beld in accordance with the terms of the decree and the property as sold to plantation for 18,0000. The master made a report that there was a deficiency of 1,263,56 and recommended that execution is nearent defendants Moses Bush and Dora Bush, who were personally it ble for the cobt. Then after the matter came before the chanc llor upon a notion by plaintiff to approve the master's report of sale and for a defini noy decree. Defendents! solicitor offer a to the. By evidence that the property was worth not less than \$25,000 and thereupon the shancalor heard testimony, introduced by defendents and plaintizes to the value of the property. Edwin H. Manasse, called by defardants, stated

that the replacement value of the property was \$30,123.40, its fair cash market value \$25,641, its value as an income producing investment was not over \$21,000, and that the gross rentals from the property during the period of redemption should amount to \$2,376. Jacob Taff, a witness for defendants, fixed the replacement value of the property at \$33,403. Defendant Moses Bush testified that the cost of the building and garage was \$32,000 and that he thought he paid \$2,500 for the lot. Marvin O. Flom, a witness for plaintiff, testified that the present fair cash market value of the premises was \$14,000; that the full value of the property placed by the assessor for tax purposes was \$12,767. Counsel for defendants argued that in view of the testimony plaintiff should not be allowed any deficiency, and cited Levy v. Broadway-Carmen Bldg. Corp., 278 Ill. App. 293, in support of his position. Counsel for plaintiff insisted that the master's report be confirmed. The chancellor stated that on the basis of rentals that would probably accrue during the period of redemption plaintiff "ought to clean up \$2,943, and that therefore he would "cut down" the deficiency recommended by the master to \$2,376. The chancellor thereupon entered the following order:

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ceeded in due form of law and in accordance with the terms of said decree and that said sale was fairly made, and the court being fully advised in the premises, Doth Order, Adjudge and Decree that the proceedings of sale and report of said Master be and the same are hereby approved and confirmed, and it further appearing to the court from said report that the proceeds of said sale report insufficient to pay the amount due the complainant under said/decree, together with the fees and disbursements and commissions of the said Master and the costs of this proceeding, and that there is still a deficiency in the amount due the complainant and that the defendants, Moses Bush and Dora Bush, his wife, are personally liable to the complainant therefor.

[&]quot;It Is Ordered, Adjudged and Decreed that the defendants, Moses Bush and Dora Bush, his wife, pay to the complainant the amount of said deficiency, to-wit, the sum of Two Thousand Three Hundred Seventy-Six Dollars, with interest thereon from the date of said Master's sale, to-wit, the 15th day of November, 1934, and that the complainant have execution therefor.

that the replacement walue of the round for a JC,1 3.60, its fair cash market value . 25,601, it volue on income market investment was not over 11,000, and that the great rately from o, and the property during the paint of the property during the .2,376. Jacob Raff, e without for durandants, Min e the reflecement value of the property ' ... 403. . when as you want tentified that the co t of the climin through a still the control of the he thought he paid \$2,50 for the lot. Weren 0. Day, and makes for plaintiff, tentified on t the product with modern law and of the premises was (14,000; that the full - has at the property placed by the assessor for tax purposes ... Illy of. . sunsel for defendents argued that in view or the tertimon glain is a sould not be allowed any deficiency, and cited have v. Bro a gay-be man Bldg. Corp., 278 Ill. app. 293, in suppost of the politica. Sounsel for plaintiff insisted that the meater's a part or configurat. The chancellar stated that on the basis of runtals this would probably acorne during the period of redemption plaintiff "ought to cloan up \$2,943, and that therefore he would "out do n" the a following recommended by the master to 22,076. The all neellor thereugen entered the following order:

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"It is Ordered, Adjudged and Dorned that the of control Moses Bush and Dorn Bush, his wif, pay so the complement the smount of said deficiency, to with the amount of said deficiency, to with there to nexcon alometro that the cate of said Manter's sale, to with interest or or saber, the cate and that the complainant have elsewith therefor.

"It Is Further Ordered that the said complainant shall have a first and prior lien upon the rents, issues and profits of said premises during the statutory period of redemption for the satisfaction of said deficiency decree, and that the gross rentals so received from said premises during the entire period of redemption shall be applied in satisfaction of said deficiency."

The chancellor entered a further order appointing a receiver for the premises, which order contained the following: "That Moses Bush be allowed to occupy his apartment rent-free during the period of redemption, so long as the other two apartments on said premises remain rented."

Plaintiff has appealed from the first order and from that part of the second order wherein the chancellor allowed Moses Bush "to occupy his apartment rent-free during the period of redemption, so long as the other two apartments on said premises remain rented." Plaintiff contends that no case can be cited that sustains the procedure adopted by the chancellor upon the hearing of plaintiff's motion to approve the master's report of sale and for a deficiency decree. Defendants assert that Levy v. Broadway-Carmen Bldg. Corp., supra (decided by this branch of the court), supports the action of the chancellor. The chancellor and counsel for defendants misinterpreted the opinion in that case. There the trial court found that the fair and reasonable market value of the mortgaged premises calculated according to reproduction cost of the building and value per front foot of the land was \$77,400, that its fair and reasonable market leasing value was \$80,000, that the amount due to the mortgages was \$71,508.45, and that complainant-mortgagee, who was the only bidder at the master's sale of the premises, bid in the property at \$50,000. We held that the trial court, upon complainant's refusal to release the entire unpaid indebtedness, was justified in refusing to confirm the sale and in ordering a resale of the premises for not In the instant case no upset price had been less than a stated sum. fixed in the decree ordering a sale of the premises. The chancellor,

"It is Further Ordered that the soid complainant shall have a first and prior lien upon the rents, issues and profits of said premises during the statutory period of redemption for the satisfaction of said deficiency decree, and that the gross rentals so received from said premises during the entire period of redemption shall be applied in satisfaction of said deficiency."

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under the decision in the Levy case, had the right to conduct a hearing to establish the value of the property, and if it appeared that there was no competitive bidding at the sals. due to the great economic depression, and that the bid of plaintiff was grossly inadequate, he might require, as a condition to confirmation, that the fair value of the property be credited upon the foreelesure judgment; but in such event the option should have been given plaintiff to accept or reject the said condition. If the option had been given plaintiff and rejected by him, the chancellor might then have ordered a resale of the property. He such prosedure was followed. The chancollor confirmed the sale but reduced the amount of the deficiency to a sum that he thought would be wiped out through the gross rentals that might be received during the period of redemption. His action in that regard constitutes reversible error.

Plaintiff justly complains that that part of the order appointing a receiver, wherein the receiver is ordered to give Moses Bush the right to occupy an apartment without payment of rent, is a clear violation of plaintiff's rights. (See Greensbaum v. McGormick, 273 Ill. app. 126, and Rehrer v. Deatherage, 336 Ill. 450.)

The judgment order of the Circuit court of Cook county confirming the master's report and for a deficiency decree in the amount of \$2.376. is reversed; and that part of the order appointing a receiver wherein the chancellor ordered "that Moses Bush be allowed to occupy his apartment rent-free during the period of recomption, so long as the other two apartments

no -- not in the first of the second of the second of the second ែម មាន ប្រជាធានា ស្រែក ស្រែក ស្រែក ស្រែក្រុម ស្រែក្រុម ស្រែក្រុម ស្រុក្សា ស្រាក្សា ស្រាក្សា ស្រាក្សា ស្រាក្សា ស្រាក្សា ស្រុក្សា ស្រាក្សា ស discrete the time are a recommended from the same and the same and platetaking was the eight several and a several several and the several and the several and the several and the THE LEW THE WAY TO SEE A PROPERTY OF THE PARTY OF THE PAR 一姓子 法证据 美国工作 二进二十四日 化克兰二氏的 一世经 经信息部 计重复的外面器 化烷 医多甲腺腺腺媒体 THE REPORT OF THE PARTY OF THE man of project in a specificant of the section of the section of the in this er of a soil of the for the taking to make then have gradered a really of the property of the barries areas made and it was followed in short this continue the in the same and by the first of distribution of the content of the content of the content of es al al la la company and all descriptions and in the contractions and in the contractions are also as a contraction of the contractions and in the contractions are also as a contraction of the contract the contract of the contract o

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on said premises remain rented," is also reversed; and the cause is remanded for further proceedings not inconsistent with this opinion.

JUBINET GRIER CORPTAINS MATTER'S REPORT AND FOR DEFICINECY DECREE OF \$2.376. AND CERTAIN PART OF OPER APPOINTING RECEIVER. REVERSED; AND CAUSE REMANDED LITH DIRECTIONS.

Sullivan, P. J., and Friend, J., concur-

Since the above opinion was written the Supreme court has filed an epinion in Levy v. Broadway-Carmen Bldg. Corp., Supra. Should the petition for a rehearing be denied in that case the trial court, upon further proceedings in the instant case, will, of course, fellow the ruling of the Supreme court in the Levy case.

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on sold premises remain routed," in the rev sell and the cause is remained for further presentings but colour intent with this opinion.

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In re Estate of JOHN W. MARSHALL, Deceased.

CYRUS S. EATON and SELDEN E. KIINE, Copartners, doing business as OTIS & CO., Appellees,

...

HELEN M. SHADDOCK, as Administratrix of the Estate of JOHN W. MARSHALL, Deceased,

Appellant.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

287 I.A. 6323

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In a trial by the court without a jury there was a finding and judgment in favor of plaintiffs in the amount of \$3,603.14. Defendent appeals.

Plaintiffs were stockbrokers and John W. Marshall had a marginal trading account with them for over four years. The account involved a great many transactions. Marshall dealt with plaintiffs through William L. Price and in connection therewith gave to plaintiffs the following trading authorization:

"TRADING AUTHORIZATION WITH PRIVILEGE TO WITHDRAW MONEY AND/OR SECURITIES

"Messrs. Otis & Company Dear Sirs:

"I hereby authorize wm. L. Price to buy, sell and trade in, for my account and risk and in my name, stocks, bonds and any other securities and/or commodities on margin or otherwise and in accordance with your terms and conditions as provided in the Customer's Contract entered into by me on this date; and I hereby agree to indemnify and hold you harmless from and to promptly pay you on demand any and all losses arising therefrom or debit-balance due thereon. You will kindly follow his instructions in every respect concerning my account with you, and make payments of moneys and deliveries of securities to him or otherwise as he may order and direct. In all matters and things aforementioned he is authorized to act for me and in my behalf in the same manner and with

In re Zetate of JOHN W. MARSHALL,

CYRUS S. MATON and SELDES S. KILW., Copartners, doing business as OTIS & CO., Appellees,

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APPEAL PROM

SINGULT COURT

CE COUR COURTY.

HELEN M. SHADWOCK, as idministration of the Batate of John W. Manshall, Decessed,

287 I.A. 632

MR. JUSTICE SCARLAN DELIVERED THE OPINION OF THE COURT.

In a trial by the court without a jury there was a finding and judgment in favor of plaintiffs in the capuat of \$3,603.14.

Defendent appeals.

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*TRADING AUTHOFLICATION ... THE RELIGIOUS TO TEMPLATE MONEY AND COUNTERS

*Messrs. Otis & Company

"I hereby authorize wm. L. Price to buy, sell and trade
in, for my account and rish and in my name, stocks, bonds and other securities and/or commodities on margin or otherwise and in
accordance with your terms and conditions as provided in the
Customer's Contract entered into by me on this date; and I hereby
agree to indemnify and hold you harmless from and to promptly pay
you on demand any and all losses arising therefrom or debit-balance
due thereon. You will kindly follow his instructions in every
respect concerning my account with you, and make payments of moneys
and deliveries of securities to him or otherwise as he may order
and direct. In all matters and things aforementioned he is author-

the same force and effect as I might or could do.

"I hereby waive notification to me of any of the aforementioned transactions and delivery of any statements, notices or demands pertaining thereto and hereby ratify any and all transactions heretofore or hereafter made by him on or for my account.

"This authorization is a continuing one and shall remain in full force and effect until receipt from me of written notice of my revocation thereof.

"JOHN W. MARSHALL

Dated May 22, 1928. (Italics ours.)

Plaintiffs never received from Marshall a written notice of revocation of the authorization. Marshall died November 16, 1931, and the claim of plaintiffs against his estate is based on the state of his account. The correctness of the account was not questioned. During the latter part of 1930 and the first part of 1931 plaintiffs made repeated requests, by telegrams and letters, upon Marshall to put up adequate margin or the securities in the account would be sold. The securities so held at the time in question were 100 shares General Water Works and Electric Corporation 7% preferred stock, 50 shares United Retail Chemical Voting Trust Certificates *A. * 50 shares United Retail Chemical Voting Trust Certificates "B, and 5/40 share Utilities Power & Light. The fractional share was subsequently sold. These securities were what is known as unlisted or "over-the-counter" securities. None save the fractional share was sold. Price testified that after a conference, in reference to the account in question, with Marshall, Miss Emma Marshall and Mr. Glover, held in the office of Wilsey & Company, where he was employed as a salesman, he went to plaintiff's office with Mr. Clover and told Stanley Morrill, the resident manager of plaintiffs' business, that Mr. Clover was there to clean up the account, and for Morrill "to go ahead and close out the account." Clover testified that this conference at the office of Wilsey & Company took place in the month of April or May, 1931, and that he went to plaintiffs!

the same force and effect as I might or could do.

"I hereby waive notification to me of any of the aloromentianed transactions and delivery of any statements, notices or demands pertaining thereto and hereby ratify any and all transactions heretofore or hereafter made by him on or for my account.

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JJAHLDIAM . W KHOL"

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office the morning after the conference.

Defendant contends that it was the duty of plaintiffs to close the account when Price directed them to do so; that at the time the order to close was given the securities that plaintiff held could have been sold for an amount more than sufficient to pay the account in full, "but even if the securities could not have been sold for enough to pay the account in full, it was nevertheless the duty of plaintiffs to have sold for whatever they could have realized." At the conclusion of the evidence and after the trial court had heard arguments of counsel, he stated that he found from the evidence that Price had authority from Marshall to close out the account and that he notified plaintiffs "to close out the account; " that the material question in the case/ Did plaintiffs, after they had been notified to close out the account, use reasonable diligence to comply with the notification? The court held that the burden was upon defendant to prove that plaintiffs had not used due diligence to sell the stock and that defendant had failed to show that there was a market for the stock. Defendant contends that the court erred in holding that the burden of proof was on defendant to prove that there was a market for the stock. We deem it unnecessary to determine this contention, as we are satisfied that the preponderance of the ovidence shows there was no market for the securities and that plaintiffs were unable to dispose of the same although they made repeated efforts to do so. Not only the testimony offered by plaintiffs but testimony offered by defendant sustains plaintiffs' theory of fact that they were unable to sell the stock although they tried for a long period of time to procure a buyer for the same. As the trial court stated, the testimony of George Gallagher, called by defendant, that Wilsey

office the morning after the conference.

Defendent court ade that it was the duty of Athintiffu and blose the account when Fried directed them so do so; that as the time the order to close we given the securities that pl intil held could have been sold our an amount more than sufficient to pay the account in full, "but even if the accurities could not have been sold for easy to gay the solount in Juli, it was nevertheless the duty of picinviffs to have old nor determ they could end wette be a senebive out to metaulones and the ".bezifeet syed trial jourt had heard arguments of counsel, he stated that he found from the evidence that Price had sucherity from Morehall to clove out the ecocumt and that he notified plaintiffs "to slove out the see was that the material question in the case Mid plaintiffs, after they had been notified to alose out the coount, use reasonblar durry only the to biliton out tille theme of constille sids bed slittinists day, your of the and another man and and such not used due diligence to a 'll the stock and that defendant had failed to show that there was a market for the stock. Defendant contends that the court erred in helding that the burden of proof was en defendent to prove that there were a un moret for the ctock. to deem it unnucessary to determine this contention, as we see ent outlit to propondatence of the wideness there was no market for the securities and that plaintiffs tor unable to dispose of the same although they made repeated aftorta to do so. Not only the testinony offered by plaintiffs but testimony offeres by defendant sustains plaintiffs' theory of flot that they see unable to sell the stock although they tried for a lang pariod of time to produce a buyer for the same. .c the teled sours totals, the testimony of George Gallegher, called by defendant, that fleey

& Company bought possibly 100 shares of General Water Works and Mlectric 7% preferred stock altogether in the months of April, May and June, 1931, is "very vague" and unsatisfactory. The testimony of defendant's witness Price conclusively shows that Gallagher's testimony is entitled to little, if any, weight. Defendant offered no evidence to prove that United Retail Chemical Voting Trust Certificates had any market value or could have been sold by plaintiffs. Price testified that these certificates had been "washed out some time before that on merger." Wilsey & Company were in the syndicate that brought out the issue of General Water Works and Electric Corporation 7% preferred stock and sold it to the public. At the time in question the country was experiencing the greatest depression in its history. Price, the intimate personal friend and agent of the deceased, worked for Wilsey & Company, dealers in securities. He testified that he was trying through a trader to get a market for the General Water Works and Electric stock: that the Marshall account with plaintiffs "was stagmant and you could not move the stocks that were in there," and that General Water Works and Electric stock "was not regular selable stock." The letter that Price wrote the attorneys for plaintiffs on September 1, 1931, states that he was trying to get a market on the 100 shares of General Water Works and Electric 7% preferred stock; that at that time there was no bidding on the stock but that he was hoping that the situation would be cleared up shortly, and that there was no way the balance of the account could be paid until the collateral could be sold. As plaintiffs argue, it was to their interest to sell the stock, if they could do so. Defendant's evidence tends to show that at the time in question brokers' offices were crowded with customers who were complaining that the brokers had sold their margin securities too hastily. The only inference to be drawn from all of the testimony is that the stock

& Company bought possibly 100 chares of General ant a corke and Michic 7% preferred atook altogether in the menths of April, May and June, 1931, is "very vague" and unsatisfactory, The testimony of defendant a witness Trice conclusively shows that . if yie. , yns it , sittif of belittes at ynomitest a trangalial Defendant offered no evidence to prove that this different Cherical Voting Trust Certificates had any market value or could have been sold by plaintiffs. Price testili d that these certificates had or veglid ", rearem no tant sapted emit eme tuo bedama need Company were in the syndicate that brought by the issue of deneral Water Works and Electric Corporation ? Fareformed stock and sold it to the public. At the time in question the country was experiencing the groutest depression in its history. Frice, the intimate personal friend and agent of the deceased, worked for wilsey & Company, dealers in securities. He testified that he was trying through a trader tant thouse cirrosiff bus shro, rets. Isrand and rol johram a seg of ton darshall account with plaintiff "was stagment and you could not Dus exto rets. Larened tant base, " smed al even tant adocts ent even Mectric stock "was not regular salable stock." The latter that Price wrote the attorneys for plaintiffs on deptember 1, 1931, states that he was trying to get a market on the 100 shares of General ster orks and Bleetric 7% preferred eteck; that at that time there was no birding on the stock but that he was hoping that the situation would be cleared up shortly, and that there was no may the balance of the account could be paid until the collateral could be sold. is plaintiffs signs, it was to thoir interest to sell the stock, if they could do me it sent a evitence tends to show that it the the time in question prokers' offices were crowded with oundomers who were somplificing that the brokers had sold their margin securities too hastily. The only inference to be drewn from all of the testimony is that the riock in question is worthless.

After a careful consideration of the evidence in the case
we are satisfied that the great preponderance of the evidence shows
that plaintiffs were unable to find a market for the stook.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur-

in question is worthless.

After a careful consideration of the evidence in the case we are satisfied that the great prependerance of the sylvance shows that plaintiffs were unable to find a market for the stock.

The judgment of the direuit court of Cook county is affirmed.

. UP MELLIFEA THEMOCUT.

Sullivan, P. J., and Friend, J., concur.

38721

BENJAMIN D. FROST. Appelled.

T.

IVAR BIGGAR, As Receiver of CENTRAL CHICAGO GARAGES, INCORPORATED,

Appellant.

9/

APPEAL FROM SUPERIOR COURTY.

287 I.A. 632⁴

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Benjamin D. Frost sued Ivan Biggar, as receiver of Central Chicago Garages, Incorporated. Derothy Fitch (then Dorothy Lawrence) also sued the same defendants and as the two cases grew out of one accident they were consolidated for trial by order of court. At the class of plaintiffs' evidence the court instructed the jury to find all of the defendants mayor Ivan Biggar, as Receiver of Central Chicago Garages.

Incorporated, not guilty. The jury returned a vardict finding Ivan Biggar, as receiver (hereinafter called defendant), guilty and assessing plaintiff Benjamin B. Frost's damages in the sum of \$22,500. The jury also returned a verdict finding defendant guilty and assessing plaintiff Derothy Fitch's damages at the sum of \$3,000. Judgment was entered upon both verdicts.

Befordant appeals but did not ask for a supersedans.

Prost, was guilty of contributory negligence as a matter of law and the trial court should have directed a verdict for the defendant at the close of the plaintiff's evidence. The trial court also erred in overruling defendant's motion for a judgment

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non obstante veredicte." Defendant makes the same contention as to plaintiff Dorothy Fitch. Defendant did not stand by his motion to direct a verdict for defendant at the close of plaintiffs' evidence but proceeded to introduce testimony in his behalf. By this course defendant waived objection to the overruling of his motion at the close of plaintiffs' evidence, and in passing upon the contention that both plaintiffs were guilty of contributory negligence as a matter of law, plaintiffs would have the right to insist that all of the evidence be considered. But if the instant contention were determined from an examination of plaintiffs' evidence alone, it would make no difference in our ruling.

The accident occurred at the intersection of Wacker drive and Wabash avenue, about 2 o'clock A. H., Hovember 27, 1932. Wabaah avenue and Wacker drive intersect at right angles, but Wacker drive cast of babach avenue runs in a southwesterly direction toward wabash avenue. North of the intersection is a bridge, 346 feet in length, that crosses the Chicago river. Befendant's garage is located north of the river and to the west of Wabash avenue. Wabash avenue from ourb to curb is 60 feet wide. Wacker drive at the intersection is about 150 feet wide. There are double street car tracks on Sabash avenue, which comtinue over the bridge and in the center of it. At the time of the assident the street lights in Wacker drive and Wabash avenue had been extinguished. The testimony for plaintiffs was to the effect that there were no lights burning on the bridge, with the possible exception of one located in the abutment in the center of the south end of the bridge. On the north side of the river were "fairly tall buildings," all unlighted at the time. It was a dark night. Plaintiffs were in a Ford car, owned by Fitch and

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Frost had driven south on Sheridan road to the Outer Drive, down the Outer Brive to Michigan avenue, and across the Michigan avenue bridge, where he turned west into Sacker drive. Defendant's car, a Studebaker, driven by one Kennedy, a servant of Central Chicage Garages, Incorporated, proceeded southward across the Sabash avenue bridge, where it entered Wacker drive. As the Ford car reached the southbound street car tracks on Wabash avenue the two cars collided. Both plaintiffs were seriously injured, but as defendent states that the damages awarded are not questioned, it is unnecessary to state the injuries sustained by each.

are unable to sustain the contention that plaintiffs were guilty of contributory negligence as a matter of law and that the court erred in not directing a verdict and in overruling defendant's motion for a judgment non obstants veredicts.

"A motion to instruct the jury to find for the defendant is in the nature of a demurrer to the evidence, and the rule is that the syldence so desurred to, in its aspect most favorable to the plaintiff, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of the plaintiff. The evidence is not weighed, and all contradictory evidence or explanatory circumstances must be rejected. The question presented on such metion is whether there is any evidence fairly tending to prove the plaintiff's declaration. In reviewing the action of the court of which complaint is made we do not weigh the evidence, - we can look only at that which is favorable to appellant. Yess V. Yess, 256 Ill. 414; MoCune v. Reynolds, 238 id. 138; Lloyd v. Rush, 273 id. 489. (Runter v. Troup, 315 Ill. 293, 296-7.) The same rule prevailed when the trial court was called upon to pass upon defendant's motion for a judgment non obstante veredicto. There is, undoubtedly, evidence that tends to support the contention of plaintiffs that their view to the north as they approached the intersection was obscured by a number of obstacles. Plaintiff Frost testified that as he approached subash avenue he slowed down his speed to five or ten miles an hour so that he sould put the

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The same rule prevailed when the could determine of agence of and approximate smalled approximation of the contract of the con

his egged to five or ten nation as hour so the head of the

car in second gear; that at the same time he looked to the south and then to the north; that he looked at the river and at the bridge; that he saw no automobiles approaching; that the first time he looked his car was about where the subway or lower level comes up to wacker drive and wabash avenue; that he was then 30 feet east of the east line of Wabash avenue; that he looked to the north again before he was hit; that as he approached Jabash evenue he was going ten to fifteen miles an hour, and as he crossed he was in second gear; that he did not see any automobile until he reached the south lane of Wabash avenue; that when he reached about the southbound street car tracks he saw an automobile coming from his right and almost on top of him; that he believed it was on the southbound street car tracks; that it was going very fast: that when he saw he was going to be hit he immediately turned his car to the left; that there was no change in the speed of the other car and no change in its course or direction until the time of the collision; that he (witness) turned his car south so that it was in a southwest position when the other car hit his right fender and wheel; that he does not know how many times his car relled over: that as he approached the bridge he looked to the north, and after he was past the northbound section of Sabash avenue he looked in that direction again; that he also looked to the south to check on the northbound traffic; "that there wasn't anything coming from the aguth;" that until he passed "that girder or steel thing on the east side of the bridge" he could not see traffic approaching from his right.

Plaintiff Fitch testified that as they approached Wabash avenue there was but one lamp burning on the bridge; that it was located at the end of the bridge on the west side; that as they

in a second grant of the and a second is a second grant of poil of the little on the point of and address oil as real boxes to be said the transmission of the transmission of the transmission time be leaked bit car and dent when we are you to leave i of the same Took said to the convert it me will be the to the said to the second and the second seco of the was in wearth from the true to the true of the same of the same of the true of the ed us; this your we decide in one! After add bedoner an flithe eficiency of the south three country of the contract and and property direction of the contract one that the more actions Task your southenand strong as sinches it is an asset for the southenance of the southena so sid where I defeated in ad of this, now all was all notice and to the left; that there was an principally he are could take out of wing off a compact the compact of the property of the squared on bone southwest president when the oth a see had been rated a record out ived believe too and construction and and and the classes test as he approached the braile he book or the merth, and after at beside and the horizontal tend to do to do to the basis of the basis and the basis of the bas month of the entire of the little of the entire entire entire on a mission with the contract that the contract of the contra no whit food . To T . 113 5 The many by Linns ords "idino on The west also of the Buldger he amild as one the trained and . Italia mis mora

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approached the bridge she was looking to the right and saw no automobile approaching; that as they got within a few feet of the bridge they slowed their speed to about ten miles an hour and shifted into second; that she was looking to the north continually and that as they approached the east side of the bridge she saw nothing; that when they got to about the northbound car tracks she saw a car which seemed to come from at least helifway across the bridge; that it was going very fest indeed; that she thought it was going seventy miles an hour; that immediately after she saw the car Mr. Frost said. "Ch. my God," and immediately turned their car to the left; that their car was between the northbound and southbound car tracks at that moment; that the acuthbound car did not alacken its speed; that the driver of that car was looking straight ahead and did not change his position nor look in any other direction; that their car was headed southwest at the time of the impact; that there were no horas blown on defendant's car; that the right side of their car was struck by defendent's car; that defendant's car was going seventy miles an hour at the time of the collision, and their car was then going fifteen miles an hour; that from the time she first saw defendant's car until the contact not more than two seconds elapsed; that Wr. Frost had turned their car about ten feet to the left before the impact took place; that defendant's car was either black or dark blue in color; that she was positive that it had only parking lights at the time. The following is the settled rule of law in this state:

"The question of contributory negligence is usually a question for the jury. It only becomes one of law for this court when the undisputed evidence is so conclusive that it is clearly seen that the accident resulted from the negligence of the party injured and could have been avoided by the use of reasonable precaution. (Beigler v. Branshaw, 200 III. 425.) Where reasonable man acting within the limits prescribed by law might reach different conclusions, or different inferences could reasonably be drawn from the admitted or established facts, the

and the contraction of the second of the contraction of the contraction to don't a war a work a died on the obligations the the bridge liney alotter that report be about as a let a light ting the fire of these controls on the same and the state of on a court to and that an time way we are to the glicantiness and a second control of the confidence of a confidence of the conf CON TOWNS THE CONTRACT OF THE CONTRACT OF A CONTRACT OF THE PARTY THE ලස්ස වියල්ව ව මල සැල් ස්වාදම වුවතට වුවතුව ගැන එළි සමස්වේ දිමේල්ට්. "ස් කිරීම් සමස්ස්ථාව THE THE PLANT OF THE PLANT OF THE PARTY OF T Mary and the control of the market of the control o the this is the control of the contr the contraction of the contracti and door a company of the total and the second of the seco ya. na what are areal or and agreeds that his has has do differed s in senar unit to it. The to the entry to always in it is an incident the continue of the conti The contract of the contract o off to the trible the selection and the selection of the collisions and their a tille. In all or a tilde The amount අතුතු අතුරුණු දී වෙන දෙන්න අතුනු දෙන්න දෙන්න වන අතුනු සහ కించి కే. కా. కి. కి. కూడి కోడా కోట్కునో విక్స్ కోట్కి దేశి మీతన్ ముందేని and profession the the contract of the feet of the contract of the Soilewing to the watth of the or it had the

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question of contributory nagligence is for the jury. (Illinois Gentral Railroad Se. v. Anderson, 184 Ill. 294; 1 Thornton on Segligence, 100.)* (Mueller v. Phelps, 252 Ill. 630, 634.)

"There is no rule of law which prescribes any particular act to be done or omitted by a person who finds himself in a place of danger. In the variety of circumstances which constantly arise it is impossible to announce such a rule. The enly requirement of the law is that the conduct of the person involved shall be consistent with what a man of ordinary prudence would do under like circumstances." (Stack v. Bast St. Louis By. Co., 254 Ill. 308.)" (Fights v. Chicago City By. Co., 254 Ill. 246.

We certainly would not be warranted in holding that the jury acted unreasonably in the eye of the law in finding that plaintiffs were not guilty of contributory negligence. Indeed, after a careful consideration of the evidence sustaining plaintiffs' theory of fact we find ourselves in accord with the finding of the jury. Defendant makes the point that it was the duty of plaintiff Derethy Fitch to ware the driver of the automobils in which she was riding as soon as danger was apparent to her and that she failed in that regard. There is no merit in this contention. Her evidence shows that Frost discovered the approaching automobils as soon as she did and that he took immediate stops to avoid the accident. Hence, there was no necessity of her warning Frost.

Defendent contends that "the verdiet in the case of Benjamin D. Frost, plaintiff, was contrary to the menifest weight of the ovidence and the trial court should have set it aside." A like contention is made as to the case of Borothy Fitch, plaintiff. After a careful consideration of all the evidence we have reached the conclusion that these contentions are without merit. This the evidence shows that Kennedy, the driver of defendant's car, was present in the hellway adjacent to the court room during the time defendant's witnesses were testifying, defendant failed to call him as a witness. One of the issues of fact was, Bid defendant's car run into plaintiff's car, or did plaintiff's car run into defendant's car? We are

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satisfied that the jury were justified in finding that defendant's car ran into plaintiff's car. Not only the testimony of the two plaintiffs supports that finding, but also the testimony of the manager of the garage to which plaintiff's car was removed immediately after the accident; and the testimony of the police officer, who arrived on the agene five or ten minutes after the accident, as to the condition of plaintiff's our after the accident. proves clearly that defendant's car ran into the right side of plaintiff's ear. Plaintiffs claimed that defendant's car had no lights on it other than parking lights. Defendant claimed that the Studebaker car had on bright head lights. During the examination of defendant's witness Enright the fellowing occurred: "Q. By the way, did the southbound car have the parking lights on or bright lights, the Studebaker? A. Parking lights." Flaintiffs' testimeny tended to show that defendant's car was being driven at a high rate of speed at the time of the accident. -cfendant's testimony tended to show that the car was going at a speed of "about 25 to 30 miles per hour. But there are certain facts and circumstances that atrongly support plaintiffs' theory of fact in that regard. The manager of the garage to which plaintiff's car was taken immediately after the accident testified that plaintiff's car was about the worst looking one that was ever brought into the garage. He described in detail the damage done to the ear and stated that plaintiff Front sold the wreck of the car to the garage for \$25. The evidence for defendant showed that plaintiff's car rolled over completely at least once and landed on its wheels again; that after the collision it was about four feet east of the safety island in sacker drive and facing sest, "about 10 or 15 feet west of the ear track;" that defendant's car, after the contact, "careened southeast and hit a

entirited that the jury our jourds! of in lacin, the delicition entim day run into plainciff's our. int only the trottiony of the two plainfiffs supports that timbing, but when the testinguly a. Tours on the statements its its of against the temperate and to immediately after the need one that the breshaug of the police officer, who arrived on the sector live or ten minutes for the the socidents on to the conception of plain lift s and with the cool, a proves clearly that detendence and real terms to make the of productive our. Florestiff of the book and the strained teds their beatings trades from a secret particular and votto it no side it tudobater dar had on bright head lights. Daring the emminesten of defendent's vitages unique the following or march of the way, did the continent can have the purities it not on bright lighte, the Studensherf A. Furking it has a lastified twittenry ed at milital to mere an entity of the mode of bedances by land sammin our time of the confidence with my like our sense to to see see of a contract of the second of the second of the second of the second of dans representatio on where night eve even event but ". word ver strongly supposed blaintiffer the ory or about it, that I guid. The manager of the garage to with his his of the or the take the sear and preda in the distribution of the first sections and weather ocret lecking one that but broader into the pair por He like to deat like demogra done on the party this state of the companies of the sold the wreak of the ear to the curren on his. The recorder for th line algebra are haliby and eithering bards benedic benedicted got likes in test. I dis things afords all as bobast bur come took evi to a do a manial tipers and in down fool much inche man il a flat out to and the contract of afontion out tookle area etherhealth post, an island marker," in Encker drive; then the two left hand wheels passed completely over the safety island in the street and the car passed to the west of the post and stopped in the space west of the safety island.

The only other contention raised by defendant is that commed for plaintiffs was guilty of improper conduct in his cross-examination of the witness Thright. This contention is without the slightest merit.

in cases of this kind and it is evident that the case was fairly and ably tried.

The judgment of the Superior court of Cook county is affirmed.

Sullivan. P. J., and Friend, J., conour.

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BOROTHY FITCH.

Appellec.

IVAN BIGGAR, as Receiver of CRITRAL CHICAGO GARAGES. INCORPORATED. appellant.

APPEAL FROM SUPERIOR COUNT OF COOK COUNTY.

287 I.A. 6331

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This case, Dorothy Fitch v. Ivan Biggar, as Receiver of Gentral Chicago Garages, Incorporated, App. St. Gen. No. 38723, was consolidated for hearing in the trial court with the case of Benjamin D. Frost v. Ivan Biggar, as Receiver of Central Chicago Garages, Incorporated, App. Ct. Gen. No. 38721, and the two cases were consolidated for hearing in this court. We have this day filed an opinion in case No. 38721, in which we have passed upon alloged errors assigned as to each case, and for the reasons stated therein the judgment of the Superior court of Cook county in the instant case is affirmed.

JUDGMENT AFFIRMED.

Bullivan. P. J .. and Friend, J .. concur-

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RITA MARY McMANUS, by FRANK H. McMANUS, her father and next friend,

Appellee,

T.

SUPREME BEVERAGE COMPANY, a corporation, Appellant.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

287 I.A. 633²

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action on the case brought by plaintiff, a minor, by her father and next friend, against defendant for personal injuries received. A jury returned a verdict finding defendant guilty and assessing plaintiff's damages at the sum of \$3,000. Defendant appeals from a judgment entered upon the verdict.

The case went to the jury on the first count of the complaint, which charges, in substance, that on April 16, 1934, defendant, through its servant, was operating a motor truck eastward on Slst street between Throop and Elizabeth streets, in Chicago; that plaintiff was then five years of age; that at said time and place defendant carelessly, negligently, wrongfully and improperly operated its automobile truck so that it ran upon and against plaintiff; that the truck was being driven through a closely built-up residence portion of Chicago at a rate of speed in excess of twenty miles an hour, in violation of the statute of the state; that defendant's driver carelessly, negligently and wrongfully operated the motor truck without keeping a reasonably careful lookout ahead in the direction in which the truck was moving, thereby causing it to run upon and against

RITA MANY MCMANUS, by FRAUM II. HoMANUS, her fither and next friend,

Appellee,

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SUPREME B TYPERAGE COMPARY, a corporation, Appellant.

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An action on the case brought by Mainteff, minor, by her father and next friend, again t d fendent for paramainfuries received. A judy returned a ver ice inding extendent fullity and as eachny plaintiff and sees the end of of co. See action of a of co. (c. Sendent appeals from a judgmane cutture upon the ver ict.

The case went to the jury on in thest court of the complaint, which charge, in substance, that on pril ha, 1834, defendent, through its arvent, open that a set between Marcop case list both stracts, in thicago; that alainties as to history case it of set that paid time and place different into the class of the compact of the compact, operated its submitted that the interpretation of the class of the class

plaintiff; that he carelessly and negligently operated the truck without giving any reasonable warning of its approach and without having used every reasonable precaution to avoid injurying plaintiff. Defendant filed an answer denying the allegations of the complaint and averring that plaintiff's injury was caused solely through her fault and negligence.

Defendant contends that plaintiff failed to prove defendant was guilty of negligence. There is not the slightest merit in this contention. Defendant offered no evidence, although it appears that the driver of the motor truck sat at the side of counsel for defendant at the trial of the cause as "a representative" of defendant. The evidence for plaintiff as to the manner in which the accident happened proves the following: Rita Mary McManus was five years of age at the time of the accident and was attending a kindergarten school. Her parents lived at 8232 Throop street, located around the corner from the place of the accident. There is a north and south alley midway between Elizabeth and Throop streets. An apartment building is located on the north side of 81st street, just west of the alley. Along 81st street there is a sidewalk six feet nine inches wide and a parkway twelve feet two inches wide. Slst street is twenty-eight feet in width from curb to curb. The accident occurred in the afternoon of a clear day and the streets were dry. The child came out of the alley on the north side of 81st street and proceeded at a slow trot southward across the sidewalk and parkway, across the north half of 81st street, and when she reached a point about three feet south of the center line of the street she was struck by the left front bumper or fender of defendant's truck, which was being driven east on Slat street at a speed of twenty-five or thirty miles an hour, on the south half of the street. She was thrown from three to seven or eight feet east and a little to the

plaintiff; that he carelessly and a gligantly user the sharp without giving very reasonable saming of its spaceal call shout having used every reasonable presention to avoid injurying plaintiff. Defendant filed an ender denying the callegations of the complaint and averting that plaintiff's injury was comed tolely through her foult and negligence.

Defendant contends that plaintiff failed to prove setundent was guilty of negligence. There is not the .la, htest marit in this facts and the contract of the second of the the driver of the motor truck sets its the crown a top of the . Harboral 5 in Paristic acorpor of as maken ent in Asiat out to the the close of doing of the war at at the little yet complies of happened proves the following: Mite Mary Helland was filte frome of medrate on his a rank model of our devolution odd to emit odd to each school. Her parents lived at 3880 throom streat, loc to around the corner from the place of the poident. There is anoth and outh alley midway between alis beth on: throop otre he. the apertment building is located on the north side of Cl t . in et, jout cast of wir f el kis Misweblu . el svort festa fat sant els gnola . welle ent inches wide and a parkway turky for the holder. ide. Ell there is twenty-eight feet in width from outb. outb. In loafeth , it was afternous to all on the state of the state of The child came out of the alley on the more party of the state and proceeded at a slow trat continent about the classical and traway, across the north half of Clet : treet, our what she z web w point about three feet : outh of the center line of the feet che was struck by the left front bumper or forder of out sudencies truck, which was being driven east on Slat streets to agend of twenty-" we or thirty miles an hour, on the outh hold of the etreet. he we.

throw from three to soven or sight fast out of little to the

north. After the truck struck plaintiff it swerved to the right, ran up on the parkway on the south side of the street, ran along the parkway for about forty feet, then ran off the parkway to the street, and finally came to a stop sixty to eighty feet east of the point of the accident. No horn was sounded by the driver of the motor truck prior to the accident. A woman who was on the north side of the street very close to the place of the accident heard the truck coming and screamed as the child trotted out into the street. From the time the child emerged from the alley at the building line until she was struck she was in plain view of the driver of the motor truck. The evidence also shows that from the time she emerged from the alley she was slowly trotting in a direction that would bring her into the path of the on-coming truck. Under the undisputed facts the jury were fully justified in finding that the driver of the truck was negligent.

Defendant contends that the amount of the damages is ex-We find no merit in this contention. The attending cessive. physician testified that he first saw the child, after the accident, at the Englewood hospital; that she was semi-conscious for several days, due to "some brain concussion; " that an X-ray examination showed "a fracture in the skull - that is, the left side of the skull, through the temporal bone extending into the left parietal bone - and a fracture of the right clavicle;" that the fracture of the skull was approximately two and one-half inches in length and extended upwards and backwards. Five or six weeks after the accident the child was still unable to walk and "she had to learn to walk over again." She lost weight and was taken to Michigan for several weeks. She was unable to attend school until the fall term commenced. Since the accident "she is a restless eleeper and wakes up frightened." The hospital bill was \$39.85, the nurse's bill, \$32, and the doctor's bill, \$80. Defendant

Defendant contends that the mountains of the sense. gridered till ambitudence whit at them on built of cessive. physician testified that he that we wanted the continuity st the mglewood hospitalt that she was semi-concorded to several days, due to "some brain concussion;" that an is to see sain tion showed "a fracture in the shull - then in the then or the skull, through the temporal bone ewten in fate the Latt yatetha one - and a fracture of the sight charless like but - enod of the simil was approximately two and one-hall broke in the the Five of cir seth this and extended upwards and backwards. the accident the child who saill uncole to a like as fine had to learn to walk over again." he lost : ight and over then to Michigan for several weeks. he was ble to atten aport well the fall term consensed. Thus the no of he less resules a elesper and waken up fil hoened. " the hopit it was the Brown

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offered no evidence as to plaintiff's injuries or condition.

During the examination of plaintiff's mother the following occurred: "Q. (by plaintiff's counsel) Is this plaintiff Rita Mary your only child? A. Yes, she is my only child. Mr. Crowe (defendant's counsel): If your Honor please - wait a minute. Mr. Sinnott (plaintiff's counsel): Q. In the month of April -Mr. Crowe: Now just a minute. If your Honor please, I want to suggest that I think that that question of counsel's is deliberately planned to prejudice this jury against my client. It serves no purpose. It is not an issue in this lawsuit whether this lady had one or fifty children. It can only serve one purpose and only probably is asked for one purpose, and I think your Honor ought to instruct the jury to disregard it. The Court: I believe the answer was not responsive to the question. He said: Is this your child? Mr. Crowe: Only child, he said. The Court: That wasn't the question, was it? Mr. Crowe: Read the question. Mr. Sinnott: Before we get into a discussion let me be heard. Mr. Crowe: Wait a minute. Read the question. (Question read.) Mr. Sinnott: And counsel made no objection to the question and the witness answered and after she answered then he interposes this prejudicial objection of his. The Court: Well, shouldn't your objection have been in time, Mr. Crowe? I would have sustained it. Mr. Crowe: Of course my mind works rather slowly. The Court: Well, I can only act as speedily as I am asked." Defendant's contention that the question was neither relevant nor material to a determination of the issues may be conceded. As the trial court stated, if counsel for defendant had made an objection in time it would have been sustained. Counsel for defendant conceded, in effect, that he was slow in making an objection. In any event, it is idle to argue that the answer of the witness influenced

offered no evidence as to plaintiff, injuries or consition. During the examination of plaintiff another the following occurred: "4. (by plaintiff's sounsel) in bits plas niff Hits Mery your only child? A. Yet, the is my only thild. Ir. Crowe (defendant's counsel): If your Honor please - val: a minute, - fird to dimer and all . . (farmure a Thithirtely) thomas . The Mr. Crowe: Now just a minute. Il your .oner ple .co. : sent to suggest that I think that that openion of comments is calleerately planned to prejudice this jusy that my elicate. It serves no purpose. It is not an issue in this languit A then this lady had one or fifty children. It can only serve one purpose and only probably is a ked for one purpose, one I ship your Momer ought to instruct the jury to disregard it. The court: I bolieve the answer was not responsive to the and tion. Il. if: is this your child? Mr. Orowe: Only chile, he seld. The curt: That wesn't the question, was it? Mr. Crowe: lived the question. Mr. Sinnott: Before we get into a di cuscion I's ne be hard. Tr. Crowe: weit a minute. Hoad ine question. [pastion well.] Mr. Simnott: .nd counsel made no objection of the evertion and the witness enswered and attitute of an antithis prejudicial objection of his. The Sourt: will, Joulin't your objection have been in time, in. Order I woals have queteined it. Mr. Growe: Of course my mind . orks mather . le ly. The Court: .ell, I can only act as upenil, as I am asked. M Defendent's contention that the question and noith a relevant nor material to a determination of the is wese may be so deded. As the trial court stated, if counsel for defendent has made an object on in time it would have been custained. Court 1.10, def ndant conoeded, in effect, that he was slow in making an objection. In say event, it is idle to argue that the conswer of the ditness influenced

the verdict of the jury. Under the evidence an intelligent, honest jury could not have found a verdict for defendant, and the amount of damages awarded is not excessive.

It appears that counsel for defendant in his opening statement to the jury stated that plaintiff's physician had told him that there was a complete recovery by plaintiff. Counsel for plaintiff asked the physician if he had made such a statement to counsel for defendant, to which the witness enswered, "Apparently from what you can see she looks all right, but we don't know what may develop in the future. Mr. Crowe: I move that that be stricken out. The Court: Yes, that is not responsive. Mr. Sinnott: Q. Is that what you told Mr. Crowe? A. Yes, I spoke of a possibility of epilepsy. Mr. Crowe: I move to strike it out. The Court: No. " Then followed a colloquy between counsel and the court in which counsel for defendant insisted that the court and counsel for plaintiff had misunderstood what he had stated to the jury. The trial court thought, apparently, that because of what defendant's counsel had stated to the jury the physician had a right to state what he told the counsel, and allowed the answer to stand. Counsel for defendant has seen fit to omit from the report of proceedings his opening statement to the jury. Defendent contends that the court committed reversible error in allowing the physician's statement as to "a possibility of epilepsy" to stand. If it be assumed that the trial court's ruling was erroneous, we are satisfied that the answer of the physician did not influence the jury when they fixed the amount of the damages. As we have heretofore stated, the amount of the verdict is reasonable in view of the undisputed injuries sustained by plaintiff. It is the settled rule of law in this state that where it can be said from the record that the errors assigned could not reasonably have affected the

the verdict of the jury. Under the evidence an intelligent, honest jury could not have found a verdict for defendint, and the emount of damages awarded is not excessive.

It appears that commeel for our fact in his op the statement to the jury stried that plaintiff's phy ician had told him that there was a complete recovery by plannistic. . . ouncel for plaintiff asked the physician if he had make much . . townert to counsel for defendent, to which the attaces consect, "apparate by from what you can nee the looks all right, out to an't know what may develop in the tuture. Mr. Crose: I move that that be stricken out, The Court: Yes, that is not responsive, Mr. binnott: Q. Is that that you told for Groves A. Yen, T spoke of a possibility of epilepsy, Mr. Crows: I may to strike it out. The Court: Mo." Then fellowed a celle by between councel and the court in which counsel for defendant insided the the court and counsel for plaintial has milwadeleteed ah a he has atat a to the jury. The trial cours thought, assentably that blockee of what defendant's counsel had states to be july the physician had a right to state what he telt the equarel, end rellow to the anever Counsel for defendant has seen the to and, from the . brista of tendnoles. . vrsi ed. of themetits minuo sid emploseory to troger raiwolls ni to to the didita ver bedlimere truc sat tent sensines the physician's statement as to "a porbibility of opilepsy" to stand. If it be assumed that the trial course to willing were arranged we are satisfied that the namer of the physician dir not in lucace the jury when they fixed the communit of the demiges. mely at aldanoser at tothrev ent to tomome oft , betate aretofered of the undisputed injuries authore by plaintiff. It is the action breese the moul ble seems of the where it out be all from the record that the errors assismed could not out analy have illected the

result of the trial, the judgment of the trial court should be affirmed. That principle of law applies to the instant appeal.

The judgment of the Superior court of Cook county is affirmed.

JUD CHENT AFF TRMED.

Sullivan, P. J., and Friend, J., concur-

result of the trial, the judgment of the trial court should be siftened. That principle of law applies to the instant quest.

The judgment of the aperior court of took county is affirmed.

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Sullivan, P. J., and Triend, J., concur.

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In the Estate of PETER REPOLE, Deceased, MARY REPOLE, Executrix, Appellant,

v.

EDWARD L. S. ARKEMA.

Appellee.

Consolidated with

MARY REPOLE, Individually and as Executrix of the Estate of PETER REPOLE, Deceased,

Appellant,

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EDWARD L. S. ARKEMA et al., Appellees. And the second s

APPEAL PROM

CIRCUIT COURT,

COOK COUNTY.

287 I.A. 633

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Eary Repole, as executrix of the estate of Peter Repole, deceased, appealed to the Circuit court of Gook county from an order of the Probate court removing her as executrix, requiring her te surrender certain personal property, and to pay the sum of \$2,187 to the administrator de bonis non with the will annexed. While the appeal was pending in the Circuit court, she, individually and as executrix, filed her complaint in that court asking a construction of the last will and testament of Peter Repole, deceased. By stipulation the appeal and the complaint were consolidated for hearing, "it appearing to the Court from representations made by the respective counsel, that the evidence to be introduced and the witnesses to be produced are substantially the same in each cause." The two causes were heard by the court, without a jury, evidence was introduced by both parties, and at the conclusion of the hearing

In the Estate of FFL AFOLE,

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EDWARD L. D. A RAME

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MARY REPOLE, Individurily and asbeceutrix of the Detate of FIT at MEPOLE, Deceased,

Uppellant,

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MR. JUSTICE SCANLAN BELIVE EL SM CHICHOLO THE COURT.

decessed, appealed to the Circuit sourt of Cock county from an order of the Erobate court a moving her as error utile, requiring or to surrender cartain personal property, and to pay the sum fig. 187 to the administrator depends non alth the after annexed. This the appeal were provided in the Circuit sourt, she liftly annexed as executrix, filed her reaplaint in that sourt askin, a sontud as executrix, filed her reaplaint in that sourt askin, a sonture of the last will an terranent of Deter tepola, decessed. Yestipulation the appearance and or sering, "it appearing to the Court from representations made by sering, "it appearing to the Court from representations made by the respective source), that the evil ence to be introduced and the statement to be produced and the

ne two causes were heard by the court, without a jury, eviction

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Mary Repole, as executrix of the entrie of Peter Repole,

the court, upon motion of appelless, entered an order dismissing the appeal from the Probate court and also dismissing the complaint. Mary Repole, individually and as executrix, has appealed from the order.

The amended petition of Rosario Nicolais et al., upon which the order in the Probate court was based, reads as follows:

"Now come Sarah Repole, Angeline Repole, Mary Repole and Rose Repole, Sam Nicolais, Sarah Nicolais, Rosario Nicolais, Camilla Nicolais and Theresa Altimare and respectfully represent unto your Honor that they are remaindermen, legatees and devisees under the Last Will and Testament of Peter Repole, deceased.

"Your petitioners further represent that on the 14th day of March, 1935 [March 14, 1929], Letters Testamentary issued to Mary Repole (but not the Mary Repole herein named as one of the petitioners), and that said Letters were in full force and effect until the said Mary Repole was discharged as Axecutrix on May 15, 1934, by order of this Court.

- "* * * That certain monies were collected by the Executrix of this estate upon a first mortgage on property at 525 West 28th Street, Chicago, Illinois, and that no accounting of said monies was made.
- and mismanage the said estate and did not make a true and perfect Inventory in the said estate, nor did she render a fair and just account of her Executorship when required to do so by law, and your petitioners represent that she did not act in good faith in the administration of the said estate, and that she violated her oath of effice in that she did not well and truly execute the Last Will and Testament of Peter Repole, deceased; that the said Executrix violated the obligation and condition in her bond, in that she did not make or cause to be made a true and perfect Inventory of all and singular the goods and chattels, rights and credits, lands, tenements and hereditaments and the rents and profits issuing out of the same, belonging to the said deceased, which came to her hands, possession and knowledge as required by law, and in that she did not make and render a fair and just account of her acts and doings as such Executrix when thereunto lawfully required, nor did she well and truly fulfill her duties enjoined on her in and by the Lost Will and Testament of Feter Repole, deceased, mor did she de in general acts required of her by law from time to time.
- "# * That by wirtue of said Executrix's failure to comply with her bond heretofore given in the above estate as aforesaid, the said Executrix has become liable on her said bond in certain sums, the exact sums being to your petitioners unknown.
- ** * * That a hearing was had on a petition filed by your petitioners before Judge Joseph F. Geary, one of the Associate Judges of this Court, the matter came up on the regular

the court, upon mes on appealance, entere and a court, which inc the appeal from the drobate don't and on o whiteship the complaint. Mary Repole, individuality and as an author, he will a them the . Tebro

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"Your petition of the companies of the left day of March, 1935 [Morch 14, 1936], I then the contamp in the to the same large of the the the the the the large of the thirt is comed to the state of the thirt is next to the same of the same petitioners), and that wild I are the large of deficit mtil the said Mary Repole was disch on a contribute or leg 15, 1934, by order of this Court.

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ne * * That the said lary hopole, sectific, ald sate toe head one curt - when son this one state of the ent ogname in him inventory in the said octates, and oil the ron or a filt and just secount of her Ementorellip when required to do so by las, and rour petitioneds reques and successful as the tangons with im sath of office in the she als now well and take executor the sat Will and Testament of the lespole, week to the old the obligation and one tilm in her bone, in tooling and out to shear of of your of or sales Jos bib one tank haventory of all and the party to the cold out that to remain a mention of the cold of the redits, lands, tenoments and hared tement, and the rats and morius assains one of the same, bed mide to the tild economic, high came to her hand, posted instant into ledge. The vired by and in that and all not a same and in that and all not a same and in the rest and delaw. The same is abstituted, more tild all the same and truly all its international modern and the same and the same and all its same and all the same an wollts isuning ont of the same, below in the said economic,

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y law from time to time.

** * That a he cang we have on a partition tills b. our petitioners be our duage losemant. de ry, cae of the seciate Judges of this fourn, the world our up on the regular trial call and being referred to the aforesaid Judge of this Court, summons having been served on the Executrix, Mary Repole, and return having been duly made that upon said hearing the Court found that fraud existed in that assets of this estate which were collected were not inventoried.

** * * That on March 28, 1934, a bill of foreclosure was filed in the Circuit Court No. 34 C.4067 by Julia C. Marx et al. vs. Mary Repole, Executrix upon property located at 3150 Princeton Ave., Chicago, Illinois.

"Tour petitioners further represent that they have the interest of remaindermen in said property located at 3150 Princeton Ave; that due to the fraudulent inventory filed by the Executrix and her failure to properly apply the funds of this Estate the said property has become wasted and lost to your petitioners.

Wherefore, your petitioners pray that an order be entered removing Mary Repole and revoking Letters Testamentary issued to her March 14, A. D. 1929, as Executrix of the Estate of Peter Repole, deceased; that said Executrix be ordered to surrender and account to this Court and to the Administrator De Bonis Non With Will Annexed that this Court shall see fit to appoint to succeed said Mary Repole for all assets collected by her and not inventoried or accounted for by her as Executrix; that this Court appoint one of the petitioners as Administrator De Bonis Non With Will Annexed upon his filing a bond with this Court and an approval of the same and for all other relief as this Court shall deem meet and proper in the premises."

The following is the answer of Mary Repole to the petition:

"Now comes Mary Repole heretofore summoned to answer the petition of Sarah Repole, et al. as reversionary heirs of said estate, and makes answer to said petition, and for answer thereto says:-

"That it is true that publication and service of notice upon the heirs herein for final closing of said estate on October 27th 1933 was duly made, and that thereupon and thereafter the final hearing upon same was continued from time to time until June 21st, 1934, at which time a hearing upon the final report and account of said Mary Repole as executrix of said estate was had, and said estate was then and there duly settled and closed. That said cause did come up for hearing on May 15th, 1934, at which time the hearing was continued until June 1st, 1934, when same was again continued to June 6th, 1934, and again continued until June 21st, 1934, at 2 P. M. at which time said estate was closed as aforesaid. All of which will more fully appear by the docket and records of this Court in said estate.

*Further answering this respondent Mary Repole denies that she failed to mender an adequate report of the assets of said estate as charged in said petition, but on the contrary states that all of the cash assets of said estate were fully inventoried by her after the receipt thereof from the Administrators to Collect first appointed by the Sourt. All of which will more fully appear from the final report and account of the Administrators to collect and from the inventory and final report and account of

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this respondent as executrix, all of which will more fully appear from the files and records of this Court in said estate.

"Further answering this respondent says that under the last will and testament of Peter Repole deceased, the petitioners took nothing except a reversionary interest in the real estate at 3150 Princeton Avenue after the death of this respondent who was given a life estate in the incomes and profits of said real estate, and that therefore this respondent was not bound to account to said estate for rents collected from said real estate.

** * That it will appear from said last will and testament of Peter Repole, deceased, that the petitioners herein were to take no personal property under said Will; that the proceeds of the mortgage covering property at 525 W. 28th street, and the bank deposits mentioned in said Will and in the petition herein filed were left to this respondent with directions that same be applied toward the first mortgage of \$4000.00 on the real estate at 3150 Princeton Avenue. That this respondent did collect the proceeds of the said mortgage on the property at 525 W. 28th street, amounting to \$1100.00 all of which was applied to the payment of interest on the \$4000.00 mortgage on the property at 3150 Princeton Avenue. That all of the cash bank deposits were collected in by the Aadministrators to Collect appointed by the Court prior to the appointment of this respondent as executrix under said Will, and were inventoried by them as part of the assets of said above estate, as will more fully appear by the inventory and final account of said Administrators to Collect, Which inventory and final account were duly approved by this Court.

Further answering this respondent shows that in the effort to carry out the directions and intentions of said testator as expressed by said Last Will and testament, and in order to preserve the real estate devised to respondent as life tenant and to petitioners as reversionary devisees, this respondent expended divers sums of money in excess of the \$1100.00 collected by her from the mortgage on the West 28th street property, out of her own means and income, as will appear by the following, to-wit:-

1,100.00

| Collected from mortgage on property at 525 W. 28th Street\$ |
|--|
| Paid to West Thirty-First Street State Bank for account of mortgage on 3150 Princeton Avenue 9 interest notes of \$135.00 each \$ 1,215.00 |
| Paid for Extension of said mortgage October 1st, 1929 |
| Paid for Extension of said mortgage January 16th, 1933 67.50 |
| Paid for necessary repairs to real estate in order to secure above extensions 1,000.00 |
| Paid for taxes on 3150 Princeton Avenue • • 1928 • • • \$ 103.37 1929 • • • 122.44 1930 • • 90.69 1931 • • 61.38 378.88 |
| \$ 3,773.88 |

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Further enacting this respondent above that in the effort to carry out the directions, a interctions of a fit test to a supressed by said is this early to the end in or a to preserve the real estate devised to respond at all tenant and to petitioners as reversional, the relationers as reversional, and a related the relationary in access of all to order or and at expendent from the martgage on the cast fill that the early of the collection of the cast and income, as will appear by the delication, to the first consecution and income, as will appear by the delication, to the first

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RECAPITULATION.

"Further answering this respondent states that the cash assets inventoried in said estate were not sufficient to pay all costs and claims in full as will appear by the final account and report of this respondent as executrix, and this respondent paid out of her own means sufficient moneys to pay all costs, claims and charges in full.

** * That the petition of Sarah Repole, et al. herein filed, was not filed in good faith for reasonable cause, but solely for the purpose of vexing, annoying and harassing this respondent and to cause her additional expense for costs and attorneys fees. That shortly after the appointment of respondent as executrix of said estate of Peter Repole, these same petitioners, or some of them, filed a wholly vexatious and unwarranted suit in the Circuit Court of Cook County to comtest the said last will and testament of Peter Repole on the grounds of fraud and undue influence on the part of this respondent; which said suit came on for hearing and thereupon said Circuit Court of Cook County entered an order directing the jury to find the issues for this respondent and dismissed said proceeding for want of equity.

- "* * * That the final report and account of the Administrators to Cellect was filed and approved by this Court prior to the appointment of this respondent as executrix under said Will, and therefore this respondent can not be charged with any waste or mismanagement of said estate in respect thereto.
- ** * * That it will appear from the final account and report of this respondent as executrix that the sum of \$150.00 allowed to the attorneys for said executrix included services rendered in defending the Will contest in said Circuit Court case, No. B-197473, which services were rendered to said estate and properly included in said final account and report.

"Further answering this respondent denies that she has in any manner whatsoever wasted or mismanaged said. estate, and denies that she has failed to make a just and true account therein.

"Wherefore this respondent states that the prayer of said petition should be denied, which is accordingly prayed."

The following is the order entered by the Probate court upon the petition and from which Mary Repole appealed to the Circuit court:

"This matter coming on to be heard upon the petition of certain remaindermen, devisees and legatees of the deceased Peter Repole, to-wit: Sam Nicolais, Sarah Nicolais, Rosario

RECARRICULATION.

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Micolais and Camilla Nicolais and the answer of Mary Repole, Executrix of the Estate of Peter Repole, said answer putting in issue the validity of the order heretofore entered by this Court on January 14, A. D. 1935 wherein a finding was made that fraud existed in the inventory in that assets of this estate were not inventoried and by reason of said finding the order of June 21, A. D. 1934 approving the final account of Mary Repole, Executrix, was set aside and leave was given to the petitioners to file their objections to the inventory and final account of said Executrix; the Court after hearing the evidence and arguments of counsel finds: that the petition heretofore filed by Rosario Nicolais et al. was sufficient in form and substance as objections to the inventory and final account of Mary Repole, Executrix; that the Court has jurisdiction over the subject matter and parties hereto; that the order entered on January 21, A. D. 1935 as heretofore described was properly entered by this Wourt; that \$2187.00 was collected by the Executrix upon a first mortgage of property located at 525 West 28th Street, Chicago, Illinois; that said Executrix, Mary Repole, further collected as assets of the Estate of Peter Repole, deceased, one player piano and one diamond ring, said diamond being 1/4 inch in diameter; one 1927 Flying Cloud Reo Sedan; one gold watch with white stone locket, household furnishings of Peter Repole, deceased, except one parlor suite, one rug, and one bedroom suite, located at 3150 S. Princeton Avenue, Chicago. Illinois; all of which foregoing personal property was collected by the Executrix Mary Repole and not inventoried or accounted for in the aforesaid final report and account; that this Court finds, therefore that fraud existed in the inventory and final report and account of Mary Repole, Executrix, that the foregoing assets of the Estate of Peter Repole, deceased, were not inventoried and accounted for in distribution and application by her according to the terms of the Will, therefore:

"It is hereby ordered, adjudged and decreed that the Letters Testamentary issued to Mary Repole, March 14, A. D. 1929 be revoked but that she be not released on her bond, and that Edward L. S. Arkema be appointed Administrator de Bonis Non with the Will Annexed upon a filing a bond with this Court and the approval by this Court of said bond in the sum of \$4000.00.

"It is further ordered, adjudged and decreed that Mary Repole, Executrix, file with this Court within thirty days from date hereof a true and just amended inventory and final account of all assets of this estate collected by her and in particular to wit: sums paid upon a first mortgage on property situated at 525 West 28th Street, Chicago, Illinois, in the amount of \$2187.00; one 1927 Flying Cloud Reo Sedan; one player piano; one ring with a diamond about 1/4 inch in diameter; one watch with studded looket; household furnishings, except as to one parlor suite, one rug and one bedroom suite, located at 3150 S. Princeton Avenue, Chicago, Illinois.

"It is further ordered, adjudged and decreed that the aforesaid personal property and all other assets of this estate not heretofore inventoried by Mary Repole be surrendered to the Administrator de Bonis Non With the Will Amnexed herein appointed within thirty days from the approval of her, Mary Repole's, amended inventory and amended final account.

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"It is further ord rod, a factor and an electric structure, ile in the article are included a true and just on a real or a ring of a rate of this at the area of this at the area of this at the article area of the area of t

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"It is further ordered, adjudged and decreed that leave be given Mary Repole, Executrix, to appeal to the Circuit Court from the orders and decrees herein entered, upon the filing and approval by this Court of a bond in the sum of \$250.00 within twenty days from date hereof."

Appellant contends that the dismissal of her appeal from the Probate court by the Circuit court was not a proper judgment to enter in the cause; that it was the duty of the Circuit court, upon her appeal, to try the cause de novo, to make findings upon the issues presented by the petition and her answer to the same, and to enter a judgment based upon the findings. It is obvious that the contention of appellant is a meritorious one, as we are satisfied from an inspection of the record that there is no merit in appelless' position that the order of dismissal can be sustained, upon the ground of want of jurisdiction, "as plaintiff did not file a proper appeal bond." Appellees concede that the appeal bond was filed by appellant in the Probate court after it had been approved by the judge of that court, but they contend that it was not filed within the twenty days fixed in the order from which appellant appealed. That order was entered on February 14, 1935, and the appeal bond was filed and approved on March 6, 1935, which was within the time fixed by the order. But even if the bond had not been filed in time, the appelless are in no position to raise the question of want of jurisdiction. After the appeal had been docketed in the Circuit court the appellees filed a general appearance in the cause. They stipulated that the appeal and the complaint should be consolidated for hearing before the trial They claim that prior to the hearing they raised the point of want of jurisdiction by a written motion to dismiss. That motion falls far short of the requirements of a pleading intended to raise a question of want of jurisdiction. It was denied, and it is clear that appellees acquiesced in that ruling. They took

"It is farthe andered, at, a compared leave be given they accounts, at the arcord and the arcord by the account and the account of a count and the account account at the account account at the account accou twenty days from deta haver a Appellant contends that he call Probate court by the stands at the 4 000 L " upon her appeals to erg a constitue the issues presented by the sector of and the enter a judgment of themself a returned the has the contention of a classical and a second re satisfied from an improvion of the vote o the character teacher of the ustained, upon th. grown we work all Military I id not file a proper promise. spead bond was filled by the district of the continuous ad been approved by the grant of the same and been 1000 Por sew of the control of the c rom which appoints the first longer deider mor 4, 1955, and the appeal from a win a grown of the agent thin to 235, which was within the tempe file by who ever, but you in the and had not be a filled in thm, the gold of the data to the also the question of a of fact afterna. It is the up of the Sen docket distance threat the Clark the file of the bosicob nec pearence in the oruge. Many att which who we in bearing Little of the of the continue of bench this law murt. They claim that prior or sin it is a reas in a colladouble . Askiral's of noites, nothing and metarinal man to than ' otion falls for there of the we alreade to the int int ...

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an active part in the trial of the cause, introduced evidence in their behalf, and cross-examined the witnesses introduced by appellant. They stipulated with appellant as to certain facts. At the outset of the hearing appellees filed a written motion to dismiss not the appeal case, but the complaint. Under the record they waived any question of jurisdiction. (See <u>Davison v. Heinrich</u>, 340 III. 349, 352-3.)

Appellees contend that the order of dismissal can be affirmed upon the theory that the trial court intended by the order to affirm the judgment of the Probate court. There is no merit in this contention. Upon appeal from the Probate court the Circuit court does not sit as a court of error and it has no power to enter an order affirming or reversing the order of the Probate court: its duty is to try the cause de novo.

Appellant contends that the court erred in dismissing her complaint. We have carefully considered this contention and have reached the conclusion that it is not a meritoricus one. We find nothing in the short, plain will of Peter Repole that requires a construction by the court. Equity will not entertain a complaint for the construction of a will when the instrument is not ambiguous.

That part of the order of the Circuit court of Cook county dismissing the appeal from the Probate court of Cook county is reversed, and the cause, as to that appeal, is remanded to the Circuit court for a new trial. That part of the order dismissing appellant's complaint is affirmed.

THAT PART OF ORDER OF CIRCUIT COURT DISMISSING APPEAL FROM PROBATE COURT REVERSED, AND CAUSE, AS TO THAT APPEAL, REMANDED TO CIRCUIT COURT FOR NEW TRIAL; THAT PART OF ORDER DISMISSING COMPLAINT AFFIRMED.

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H. E. LACY MFG. CO., a corporation,
Appellant,

V.

LACY PRODUCTS CORP., (a corporation, Appellee.

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

287 I.A. 633⁴

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order entered December 12, 1935, assessing damages against it for attorneys' fees alleged to have been incurred by defendant in procuring the dissolution of a temporary injunction.

On August 30, 1935, plaintiff filed a complaint praying that defendant be enjoined from interfering with the business of plaintiff and from threatening plaintiff's customers and prospective customers with suits by reason of their use of plaintiff's products, and seeking damages for alleged unfair practices indulged in by defendant prior to the institution of the suit. On September 19, 1935, defendant filed a motion to dismiss the complaint for certain alleged insufficiencies as to the form of complaint. Thereupon the court ordered defendant to file its answer to the complaint in ten days. On October 11, 1935, defendant filed its answer denying the allegations of the complaint and further denying that plaintiff was entitled to the relief prayed for. On October 17, 1935, the court entered the following order:

"On motion of Charles A. Boyle solicitor for defendant, Lacy Products Corp., it appearing to the Court that temporary

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the court entered the lollowing order:

MR. JUSTICE SCANIAN TO DIV TO DE CARDON DE LA RECONDOR L. .

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"On motion of Charles a. Boyle colisitor for defendent, Lacy Products Corp., it ap.esrin, to the Court that temporary

injunction granted by this court on August 31, 1935 was secured ex parte and without notice to this defendant; and it further appearing that the answer has been filed herein, and it further appearing that the ends of equity will be best served by a hearing upon bill and answer,

"It Is Hereby Ordered that the temporary injunction herein be dissolved and that the hearing in this cause be continued to Nov. 4, 1935 at 2 o'clock until heard, all without notice to the parties -"

On November 6, 1935, plaintiff filed a motion to "dismiss the complaint herein," and thereupon, upon the same day, the court entered the following order:

"On motion of Maruce S. Cayne solicitor for plaintiff for leave to dismiss the complaint herein and the parties hereto appearing in Court by their respective attorneys upon notice duly given

"And it appearing to the Court that no counter-claim or cross-complaint has been filed heretofore

"And the Court being otherwise fully advised in the premises:

"It is hereby ordered that the above entitled cause be and the same is hereby dismissed without plaintiff's costs; costs having been paid.

"It is hereby further ordered that the bond heretofore filed in this cause stand until the determination by the Court of defendant's damages, if any."

On December 5, 1935, defendant filed a motion for leave to file "its suggestion of damages incurred in the dissolution of the injunction heretofore granted," and the court thereupon entered an order granting said motion. On the same date defendant filed its suggestion of damages, in which it averred that it had sustained damages in the sum of \$300 "for the reasonable fees and charges of his solicitors and counsel and for other charges and expenses in and about the procuring of the dissolution of the writ of injunction in said cause, rendered necessary therein by reason of the wrongful suing out of the same." On December 12 the trial court entered an order finding that defendant had sustained damages by reason of the suing out of the injunction and had become liable to Charles A. Boyle in the amount of \$200

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"It Is Hereby Ordered that the temporary injunction herein be dissolved and that the hereing in this cause of continued to Mov. 4, 1935 at 2 c'alock until here', all withous notice to the parties -*

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"It is hereby further orders, that the bend heretofore iled in this cluse stand and it the Ocurat defendent's damages, if any."

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for his services in procuring the dissolution of the injunction, and ordering plaintiff to pay to defendant or its attorney said sum. Plaintiff appeals from that order.

Plaintiff has raised and argued six points in support of its contention that the judgment order should be reversed, but it is only necessary to pass upon one of the points. Plaintiff contends that the trial court had no jurisdiction to assess damages upon a suggestion filed after the dismissal of the proceedings. This contention is a meritorious one. Sec. 12, ch. 69, Ill. State Bar Stats. 1935, reads as follows:

"In all cases where an injunction is dissolved by any court of chancery in this State, the court, after dissolving such injunction, and before finally disposing of the suit, upon the party claiming damages by reason of such injunction suggesting, in writing, the nature and amount thereof, shall hear evidence and assess such damages as the nature of the case may require, and to equity appertain, to the party damnified by such injunction, and may award execution to collect the same: Provided, a failure so to assess damages shall not operate as bar to an action upon the injunction bond."

Plaintiff dismissed its suit on November 6, 1935, leave was not granted defendant to file its suggestion of damages until December 5, and the order assessing damages was not entered until December 12, 1935. Suggestions of damages may be filed, upon leave, at any time before a decree is filed, and it has been held that where that is done a trial court, by reserving in the decree the question of the assessment of damages for a further hearing, retains jurisdiction for the purpose of hearing and determining the said question. But here leave was given to file the suggestion of damages nearly a month after the entry of the final order. The motion and the suggestion of damages therefore came too late. Had the trial court, on December 5, vacated the order of November 6, he might then have properly granted leave to defendent to file its suggestion of damages, and he might also, upon a hearing held before or after the re-entry of the decree dismissing the suit, have entered an

for his services in producing the dissolution of the injunction, and ordering plaintiff to pay to defendent or its attention, send

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sum. Plaintiff appeals 1 on that order.

Plaintiff has raised and argues six joints in repport of its contention that the justment order should be reversed, but it is only necessary to pass upon one of the point. That the trial cours for an just which to as the damages antends that the trial cours for an just which to as the damages appear it is described after the distinct of the properties frage. This

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order in reference to the suggestion of damages; but this procedure was not followed.

The judgment order of the Circuit court of Cook county of December 12, 1935, is reversed.

JUDGMENT ORDER OF DECEMBER 12, 1935, REVERSED.

Sullivan, P. J., and Friend, J., concur-

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county of December 1., 1. (E, 1 - ver) .

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38862

JOHN H. VICTOR,
Appellant,

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R. BERNARD KURZON, ALEX FREUNDLUCH and CHARLES IZENSTARE, Appellees.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

287 I.A. 6341

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendants to recover damages on account of the alleged fraud of defendants in connection with the exchange of two pieces of real estate, both located in Chicago. Defendants filed a metion to strike plaintiff's complaint and amendment thereto, which motion was allowed, and plaintiff electing to stand on his complaint, as amended, the court entered a judgment for costs against plaintiff.

Paragraph First of the amendment to the complaint alleges:

"Seventh: That at least thirty (30) days prior to the execution of said contract of exchange, the exact date of which the plaintiff is unable to state, the said defendents, to induce the plaintiff to make such exchange, fraudulently, maliciously and falsely submitted to plaintiff plans and specifications for the apartment building located on the premises described in the second paragraph hereof, in which it was shown that the said apartment building was fully equipped with and that there had been erected therein an approved automatic pump, having a capacity of not less than 500 gallons per minute to supply the standpipe with water, which was a full compliance with and in accordance with the fire ordinance of the City of Chicago regulating the construction of such an automatic pump in apartment buildings of the size and character of the one erected on the premises described in the second paragraph hereof, which plans and specifications are made a part hereof by reference and copies of the relevant or material parts of said plans and specifications are hereto attached, marked Exhibits 'A' and 'B' and made a part hereof."

JOHN H. VICTOR,

Appellant,

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I SERVARD KURACH, ALCY FRUNDLUCH and CHA RES LEWSTAFE,

Appellocs.

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MR. JUSTICE BOUNDARY DELIVED THE CONTROL OF HOLDERS

Plaintiff sued defended as a recover or gue on advount of the alleged fraud of defend his in deal obtain with who with the english poth theoretic in this and electrical antised a motion to atrike all intilly approximate the anotion to atrike all intilly approximate the end motion are allowed, and a arrive election to the termination are allowed, and a arrive allow ment for an is complaint, as amended, the court after ment for sects against relainfilf.

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"Seventh: Mr.t. t le 16 hirty (1. deye wire to the sevention of said contratt of words are, to exect at the plaintiff is unable to state, the wide defend att, to induct the plaintiff to make auch walenge, its wide defend att, to induct the plaintiff to make auch walenge, its wide defend at a could gardy submitted to [1. in disc plant of special of an order than the building was index in the second paragraph hereof, in which it was also at the second paragraph hereof, and the wind it was a court of the first of an order in the second paragraph at the second was single with water, which was a submitted at the continue of the second and with the tire of thence a second with a contration of the second and a second at the second and a second and and appendict them are an an all posts of the selection of an all posts of the selections and appendictions of the second and and appendictions of the selections and the second and and a perifications of the selections and a second and a seco

Exhibit "A" is a plan or plat of the basement floor of defendants' apartment building, which shows fire service equipment. Exhibit "B" contains the specifications and requirements of "Fire Pump Equipment." Paragraph Eighth of the complaint alleges:

"That the portions of said plans and specifications showing that said apartment building was fully equipped with and that there had been erected therein an automatic pump or sprinkler system, were false and untrue and were known to the defendants to be false and untrue, and that said plans and specifications were submitted to the plaintiff with the intention and purpose of making the plaintiff believe that the said apartment building was equipped with and that there had been erected therein a sufficient automatic pump or sprinkler system, all of which were known to the said defendants to be false and untrue, and were made with the intent and purpose of deceiving plaintiff into executing the said contract for the exchange of said properties."

Paragraph Ninth alleges:

"That the plaintiff believing and relying upon the truth of the statements and showing with reference to such automatic pump or sprinkler system, as contained in said plans and specifications, as hereinbefore alleged, executed the said contract of sale and subsequently carried out and performed said contract of sale by conveying the property owned by him and described in the first paragraph hereof to the Foreman Trust and Savings Bank, as trustee, and received the conveyance of the property described in the second paragraph hereof from the said Foreman Trust and Savings Bank, as trustee."

The plans and specifications have upon their face the following:

"R. Bernard Kurzon Architect." R. Bernard Kurzon is one of
the defendants in the action. The complaint, as amended, also
contains allegations to the effect that because no such pump had
been erected by defendants in the apartment building plaintiff
was compelled by the authorities of the city of Chicago to erect,
at his own expense, such a pump in the building, in compliance
with Section 1301 of the Fire Prevention Ordinances of the
City of Chicago.

Defendants' motion to strike was based upon the following grounds:

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alleges:

"That the pertians of weil law and pentiful forms showing that said apultant all in the relational of and that there had been creeted there in a ruthmarkle purp or sprinkler system, were full an untrue as and articles in the defendants to be false and untrue, as all aries in the safe lies and specifications were a unmit ed to tell in the full of and purpose of saiding the parim if all it we true the said apartment building ver again if all it will be true and been erected therein a unulation in a contract and been erected therein a unulation which were known to the standard untrue, and were made with the intensity of the contract and untrue, and were made with the intensity of the contract of properties.

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- *1. The said Complaint does not set forth a cause of action.
- "2. The 'submission of plans and specifications' alleged to have been 'submitted to the plaintiff with the intention and purpose of making the plaintiff believe that the apartment building was equipped with, and that there had been erected therein, a sufficient automatic pump or sprinkler system' is not sufficient in law for the plaintiff to maintain his action.
- "3. Paragraph 9 of the Complaint charges that 'the plaintiff believing and relying upon the truth of the statements and showing with reference to such automatic pump or sprinkler system, as contained in said plans and specifications' but nowhere in the plaintiff's complaint does it appear or does it charge that the defendants or any of them made any statements or representations to the plaintiff."

Plaintiff contends that the court erred in sustaining the motion of defendants to strike or dismiss the complaint, as amended; in dismissing the cause of action, and entering judgment for the defendants for costs.

As to the three grounds upon which defendants based their motion to strike: Ground 1 need not be considered for the reason that it is not in compliance with sec. 45 (1), par. 173, of the Practice act, which provides, in part, that "such motion shall point out specifically the defects complained of. " Grounds 2 and 3 are apparently based upon the theory that the submission of false plans and specifications of the apartment building, even though they were submitted with the intention and purpose of making plaintiff believe that the apartment building was equipped with and that there had been erected therein a sufficient automatic pump or aprinkler system, would not be sufficient upon which to base a charge of actionable fraud; that the mere submission of false plans and specifications to plaintiff, even with the intent and purpose of making him believe that the apartment building was equipped with a sufficient automatic pump or sprinkler system, unaccompanied by any statements of defendants to plaintiff in reference to the same, would not constitute actionable fraud. Plaintiff

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"3. Paragraph 9 of the conclain charges that the plaintiff believing and relying upon 50 to this of the statement and showing with reference to and colourable paragraph of children as contained in releasing the colourable call and the plaintiff ought in the plaintiff ought in the colourable of agree that the definiones of agree the colourable of agree that the definiones of agree the colourable of the plaintiff."

Flaintiff contends the construction in the indication of defendants to strike or challes the compaint the cruse or thion, and it is in from the cruse or thion, and it is in from the content of contents.

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hat it is not in compliance with the structure of the rectice act, which provides, in the structure in the shall cint out specifically the structure and later the structure of structure apparently based upon the sheary sixt of the structure and apecifications of the specification of the structure of actionable fraud; the structure of actionable fraud; the structure is structure in all flow the structures and apecifications to slainful.

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concedes that it must be assumed from the pleadings that there were no oral false statements made by defendants to plaintiff and that the latter's case is based upon the misstatements contained in the plans and specifications.

"Fraud in its generic sense, especially as the word is used in courts of equity, comprises all acts, emissions, and concealments involving a breach of legal or equitable duty and resulting in damage to another. Fraud has also been defined as cumning or artifice used to cheat or deceive another." (26 C. J. 1059.)

"Fraud may be found from a variety of circumstances. There is no general rule for determining what facts will constitute it, but it is to be found or not according to the special facts of each particular case. It may consist in a misrepresentation, that is, in the positive assertion of a falsehood, or in the creation of a false impression by words or acts, or by any trick or device, or in a concealment or suppression of the truth, or in both a suggestion of falsehood and a suppression of truth together. And it matters not, so far as the right of action is concerned, whether the means of accomplishing the deception be complex or simple - a deep-laid scheme of swindling or a direct falsehood - a combined effort of a number of associates or the sole effort of a solitary individual - provided the deception is effected and the damage complained of is the consequence of the deception."
(12 R. C. L. 232. Italics ours.)

"The Century Dictionary defines fraud as 'an act or course of deception deliberately practiced with the view of gaining a wrong or unfair advantage; deceit; trick; an artifice by which the right or interest of another is injured.' In Story's Equity Jurisprudence (vol. 1, secs. 186, 187,) it is stated that fraud, in its general sense, comprises all acts, omissions and concealments involving a breach of legal or equitable duty, trust or confidence and resulting in damage to another. This definition is approved in Diversey v. Johnson, 93 Ill. 547, and 26 Corpus Juris, 1059. Bouvier's Law Dictionary (vol. 1, p. 843,) states that active and positive fraud includes cases of the intentional and successful employment of any cunning, deception or artifice to circumvent, cheat or deceive another." (Lliason v. Wilborn, 335 Ill. 352, 357-8. Italics ours.)

"The charge in this case is fraud - that the judgment was procured as a fraud upon the city and that the assignment of the cause of action was a fraud upon Dora Sampson. Fraud includes anything calculated to deceive, whether it be a single act or combination of circumstances, whether the suppression of truth or the suggestion of what is false, whether it be by direct falsehood or by innuende, by speech or by silence, by word of mouth or by look or gesture. (Bishop's Equity, 206.) (People t. Cilmore, 345 Ill. 28, 46. Italics ours.)

with * * "If one conducts himself in a particular way, with the object of fraudulently inducing snother to believe in the existence of a certain state of things, and to act upon the basis of its existence, and damage resulted therefrom to the party misled, he who misled him will be just as liable as if he had misrepresented the facts in express terms." Northeastern

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Railway Co. v. Wanless, L. R. 7 H. L. 12; Downey v. Finucane, 205 N. Y. 251 [98 N. E. 391, 40 L. R. A. (N. S.) 307.] * * **** (Pennebaker v. Kimble, 269 Pac (Or.) 981, 984. Italics ours.)

*Counsel further contends there is no allegation that the defendant ever knew the plaintiff or ever made any representations of any sort to her. It is true, the representations were not by means of conversations between the parties; but the rule is as stated in the Law of Fraud, by Bigelow, (p. 467,) that a representation is anything short of a warranty, 'proceeding from the action or conduct of the party charged, which is sufficient to create upon the mind a distinct impression of fact, conducive The most usual and obvious example is an oral, written of action. or printed statement. But statement is by no means necessary. Any conduct capable of being turned into a statement of fact is a representation. There is no distinction between misrepresentations effected by words and misrepresentations effected by other acts. It is sufficient that there were acts such as to mislead a reasonably cautious or prudent man in regard to the existence of a fact forming a basis of or contributing an inducement to some change of position by him. In this case, the recitals in the deeds and trust deed, stating a consideration which inferred that the property was of great value whereas the interest of the defendant therein was of no value whatever; the memorandum on the notes that they were secured 'by a trust deed to Chicago Title and Trust Company, trustee, of even date herewith, on seven-story and basement building, No. 188 East Monroe street, city of Chicago, implying that the trust deed conveyed the fee simple title; the recital in the trust company's certificate that these notes were a part of a series of notes amounting to \$75,000, 'secured by trust deed,' and likewise the statement that 'in consideration of the interest being paid in full the time is extended to May 1, 1899, signed by Miller, are in law representations calculated to deceive and mislead any third persons dealing with those notes. Especially is the statement by Miller misleading and deceptive. It amounted to a statement that the notes were originally given to him as a part, only, of the purchase price for the property; and that statement, taken with the recitals of consideration \$100,000, naturally leads to the inference that he received \$25,000 of the purchase price in money and \$75,000 in said notes." (Leonard v. Springer, 197 Ill. 532, 538-9.)

"A person who, by conduct, contributes to the misapprehension of another as to a material matter, and intentionally fails to correct the misapprehension, is guilty of a fraud." (Bell v. Felt, 102 Ill. App. 218, 227.)

"A false representation need not necessarily an oral, printed or written statement, but may arise from any conduct capable of being turned into a statement of fact; and negligence cannot be imputed to a defrauded party, so that he who commits the fraud may escape liability." (Smith v. Miemann, 216 Ill. App. 179, 185. Italics ours.)

"Implied Representations; Maps and Plats. - To constitute a misrepresentation it is not essential that there be a direct affirmation as to the existence of a certain state of facts. This is exemplified in the cases where maps and plats are exhibited which purport to show the general characteristics and surroundings of the land, as where in case of a sale of timber land a map or plat of the land is exhibited showing a fine stream of water and

"Gounsel further sentence in the care will rection in the defendant ever know the carefully of ver main any recent that the care the falls of any spect to here, is in true, the care of any spect to here, is in true, the not by means of coarers wione b town to president but the Land The as stated in the Leve of Trans, by Mighos, (u. 175) In a sepresentation is empthin the observation of the partial of the p by conduct composite of body, while there are a transfer of the representation. There is no strainet on between misr problems of footsed by .o. a and misrgarsentitions of cot of be (there of). It sufficient that there were noted out to the terminally subject on the transfer of the control of basis of or contributing on industrial to bot on the of porition basis of the this case, it resides in the faction with the facting a consideration high information to the projector with the facting a consideration. rest value whereas the int want of the blome no divining ... nluo whatevar; the constanting on while can be defined by a truet deed to while go while can be a true of any, the top of ven date herrwith, on acver-sory and baser at 1.01 in , he 1 : ast Morroe street, city of Thio of Indiginal in a surjective of est Monroe street, city of Maior o, implying Michael Marche onveyed the fee single stall; Marche Marche the force art, which will all the state that there art, were a particular that that the one is a tion and that that that in concident that the state of sta 38-9.

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a mill site which were essential to the marketing of the timber, whereas in fact the indicated stream was merely a gully carrying water only a small part of the year; or where in the sale of town lots in a new development a map is exhibited by the vendor showing a street material for access to the lots, which in fact did not exist or was a private way laid out by others on their own land." (27 R. C. L. 364-5.)

In State v. Gaillard, 1 Am. Dec. (S. C.) 628, the alleged fraud consisted of a false showing on a plat. The court, in helding that the purchaser had a right to rely on the plat, states (p. 631):

"The plat produced at this sale represented upon the face of it these essential requisites. It carried, therefore, a false-hood and misrepresentation in its front, well calculated to take in and deceive unwary men, who were likely to trust to such representations made by public men in the execution of a public trust. There was nothing better calculated to impose upon a purchaser than a plat which had the appearance of an actual survey and ebservation, with explanatory notes made upon it." (Italics ours.)

In Chatham Furnace Co. v. Moffatt, 18 N. E. (Mass.) 168, the court held that a purchaser of property had a right to rely upon the accuracy of a survey of the premises submitted to him. In McCall v. Davis, 56 Pa. St. 431, in holding that the vendor of property was bound by the plan and plat of a subdivision which he exhibited to the bidders, the court said (p. 434):

"When, therefore, Davis produced his plot to the bidders at the public sale, exhibiting East street as one of the streets in his plan, and referring to nothing on its face to correct this impression or to inform the bidders that it was laid out by others on their own ground, it was an act which affirmed, as loudly as words could speak, that this was a street dedicated by him to the use of those who should become purchasers of his lots. It was an affirmation of a positive fact, which if material entered directly into the consideration of the purchase; and if false is a ground of relief in equity, when its falsity was unknown to the purchaser and when he has taken no covenant to protect himself." (Italies ours.)

In <u>Hicks</u> v. <u>Stevens</u>, 121 III. 186, wherein one of the elements of alleged fraud consisted of statements made in printed circulars in reference to the patent or invention involved in the case, the court said (p. 197):

"There was no error in admitting in evidence the printed circular of Hicks, showing the valuable qualities of his invention, The proof shows that he gave Stevens one of them during their negotiations, containing material and important representations

a mill site which were estand is some restant for another whoreas in fact the intro ted strom a set ly that our ylus water only se anall part of the year; or liere a tac also or some lots in a new dayslophent a map in chilical again who or a dairy a atreet metarial ker accell to the lots, drich is find in a not gaint or was a private way last out by about on their silence. (27 2. C. I. 364-1.)

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court said (p. 160):

better the consense of the while all total on new broff" circular of Hicks, showing the ble qual tick of a far athis he e car the star is a family and thought the their negotiations, or article that the transfer one take the constant of what his invention would accomplish as a means of saving steam and fuel, - that it would save its cost in a month, - while the proof showed that, practically, it was of no value in the respect mentioned in the circular. These circulars were printed and distributed for the purpose of inducing others to purchase rights of him, and the statements therein may be regarded as of a more deliberate character than if made in a conversation. They were properly admitted. See 2 Pomeroy's Eq. Jur. Sec. 881, and also Cooley on Torts, 477." (Italics ours.)

After a careful consideration of the allegations of the complaint, as amended, and the authorities bearing upon the question now before us, we are satisfied that the complaint, as amended, makes out a <u>prima facie</u> case of actionable fraud and that the court erred in striking the complaint, as amended, dismissing the cause of action, and entering judgment for costs for defendants.

In this court defendants contend that it must be assumed from the allegations of the complaint, as amended, that plaintiff had an opportunity to examine the defendants' property; that no facts are alleged in the complaint, as amended, to show that plaintiff had a right to rely on the representations of defendants; and that in the absence of such allegations the law requires that plaintiff, in the exercise of prudence and care, should have examined defendants' property before he consummated the deal. No such point was made in defendants' motion to strike. Had defendants raised such point in support of their motion to strike, if he deemed it necessary, plaintiff might then have amended the complaint in that regard. Moreover, a party guilty of fraudulent conduct whereby he induces another to act will not be allowed to impute negligence to the latter as against his own deliberate fraud. (Pustelniak v. Vilimas, 352 Ill. 270. See also Antle & Bro. v. Sexton, 137 Ill. 410, 413-4; Linington v. Strong, 107 Ill. 295, 302-3; Herpich v. Williams, 300 Ill. 540, 545-6;

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11. 296, 302-31 Herming : . Tilling , 300 111. 047, 545-6;

Carver v. VanArsdale, 312 Ill. 220, 230.)

The judgment of the Circuit court of Cook county is reversed, and the cause is remanded with directions to the trial court to overrule the defendants' motion to strike the complaint, as amended.

JUDGMENT REVERSED, AND CAUSE REMANDED WITH DIRECTIONS

Sullivan, P. J., and Friend, J., concur-

Carver v. VanAradale, 328 111, 200, 230.)

The judgment of the directle coult to the reconstructions to the remanded with the retions to the trial court to overrube the draidente! . Other to trike the complete, as as added.

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Sullivan, P. J., and Friend, J., concur-

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TONY MASINSKI and RATTE MANTENIA.

Amodilees.

TON DULAK and WALTER B. PINER.

Appellants.



APPRAL PROB STREET, OF COUP". GOOK E COUNTY.

287 I.A. 634²

MR. MATTON MEASLAN DELIVERED TOR CETATOR OF THE COU. T.

Tony Masiaski and Eatle Wasinski, his wife, good Ton Smink and Walter M. Fisher in an action of fraud and deceit. A jury returned a verdict finding defendants guilty and assessing plaintiffs' damages at the own of 1,800. To the following cuestion submitted to them by the court, "Old the defendants, Tom Dalak and Halter T. Figher. Wifully, melicionaly, felocity and fraudulently deceive and defrand the claintiffe an charged in the declaration?" the lary answered, "Yes," Defendants approx from a judgment entered upon the verdict.

This was the second trial of the count. In the first, one by the court without a jury, defendants were found willy and plaintiffs damages were essented at the one of 1, 14.40. Thou an appeal from the judgment autored upon the finding we reversed the judgment and remended the course for a new trial agon the cols ground that there had not been an orderly and proper trial of the C 参加 列动。

The declaration alleges, in abstance, that eleintiffs were induced to convey to James clasy and ands coldny, his wife, their farm in Wisconsin in eschange for certain real extate in Chicago by false and franchisht representations make by defendants to plaintiffs in reference to the Chicago property, thereby chairtiffs were deceived and damaged.

The atterney who appears for defendants in this court upon the instant appeal took so part is either of the trials in the lower court.

Defendants contend that "the amended declaration does not state a cause of action." It appears that some months after the first judgment was catered plaintiffs, by stipulation of the parties. were permitted to file an smended declaration. Goan the first appeal, however, defendants contended that the case was tried upon the original declaration. Upon the second trial defendants contended that by agreement of the parties the smended declaration was not a pert of plaintiffs' case. In this court they argue that the so-called amended declaration was the declaration upon which the case was tried. The instant contention is merely an afterthought. In the lower court the sufficiency of neither the so-called amended declaration nor the original declaration was ever directly cuestioned by defendants even in their written section for a new trial, and they are forced to rely upon their formal motion in arrest of judgment in support of their contention that the amended declaration does not state a cause of action. Thile it is true that when a declaration is so defective that it will not sustain a judgment such defect may be availed of an motion in arrest of judgment, nevertheless, defendants, in view of their position in the lower court. are in no position to raise the instant question. But as coming that they have the right to rules it, we find no substantial morit in it. The point made by defendants is that the amended declaration does not specifically allege that the de 1 between pinintiffs and the Wolneys was ever consumented by the Wolneye' transferring the Chicago property to plaintiffs. The original declaration undoubtedly contains sufficient allegations in that regard, and that is, of course, the reason why defendants are now claiming that the case was tried upon the amended declaration. It may be

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 conceded that the amended declaration does not allege the fact that
the Wolneys conveyed the Chicago property to plaintiffs, as clearly
as the original declaration, nevertheless, we think that the amended
declaration is not so defective in that regard that it will not
suntain a judgment. Before verdict the intendments are against
the pleader, and upon demarrer to a declaration nothing will suffice,
by way of inference or implication, in his favor; but on notion in
arrest of judgment the court will intend that every material fact
alleged in the declaration, or fairly and reasonably inferable from
what is alleged, was proved at the trial; and if, from the issue,
the fact emitted and fairly inferable from the facts stated in the
declaration may fairly be presumed to have been eroved, the judgment
will not be arrested.

that had it not been given in evidence the jury could not have given such a verdict, then the went of stating that matter in express terms in the declaration, provided it contains terms sufficiently general to comprehend it in fair and reasonable intendment, while he cared by verdict." (Fennsylvania Co. v. kliett, 132 lil. 654, 653.)

We are satisfied that it is fairly and reasonably inforable from what is alleged in the amended declaration that the Solneye conveyed the Chicago property to plaintiffsia consumnation of the deal, and upon the trial defendants conceded that the Solneye did so transfer.

Where a plaintiff has a good cause of action, even though it be

** There a matter is so coscotially necessary to be proved

defectively stated, judgment will not be arrested after pleas are filed to the marite and a verdict has been returned. In the instant case plaintiffs had a good cause of action, defendants filed pleas to the marite, and a verdict has been returned.

case by their testimony in chief," and that the court erred in not instructing the jury to find for defendants at the class of plaintiffs' case. It is sufficient to say, in ensure to this contention, that when the court everywhed their setten for a persectory instruction at the close of plaintiffs' evidence, they offered evidence in

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their behalf, and they, therefore, waived their motion. However, even if the instant contention had not been waived we would be forced to find no merit in it.

The further contention of defendants that the evidence shows that defendants did not defraud plaintiffs and that the verdict is contrary to the evidence, does not appeal to us. The trial court upon the first trial, and a jury upon the second, found the issues for plaintiffs. The trial court, upon the second trial, approved the verdict. There are certain facts and directes tances in the case that estimy us that plaintiffs' claim is a just one. We certainly would not be warranted in holding that the verdict is manifestly against the weight of the evidence.

We find no serit in the further contention that "no damages were proven by plaintiffs."

Plaintiffs' motion to dismiss the appeal is denied.

This case seems to have been ably and fairly tried and the record is free from errors usually assigned in a proceeding of this kind.

The judgment of the Asperior court of Gook county is affirmed.

. CHARLET AFFECTO

Sulliven, P. J., and Friend, J., someur.

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EDWARD SKYRIARSKI, by his next friend, Busher Gradivski.

Appalles,

PROPLET FINANCE COMPANY, A corporation,

Appollant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

287 I.A. 6343

MR. JUNETUR SCARLAS DELIVERED THE OFFERDS OF THE COURT.

Edward Bryslerski. by his next friend, Russens Crajewski. plaintiff, sued the Peoples Finance Company, a corporation, defendant. The case was tried by the court and there was a finding and judgment entered against defendent for 352.08. Defendent appeals.

On October 27, 1934, plaintiff, Idward Brymlerekl, purchased from defendant on Auburn automobile and paid therefor the oum of \$298.55. On October 25, 1935, he traded that automobile to defendant for a Continental sedan, for which he paid, in cash, the sum of \$28.50; received a trade allowance of \$125 on the Auburn sutemobile: and the balance of .475 was secured by oleven notes of 525 each and one note for 200. Thereafter he paid the first of the \$25 notes. On January 7, 1935, plaintiff, being unable to proceed with the contract, returned the automobile to defendant. In the instant suit plaintiff alleges that on Cotober 27, 1934, he was under the age of twenty-one years and he "electe to terminate any and all liability by reason of contracts and elects to recover said sums as aforesaid." In defendant's Affidavit of merits it denied that plaintiff on Cotober 37, 1934, was under the age of tweaty-one years.

Defendant states: "The sole and only question in this case is as to whether or not the plaintiff was an infant at the

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Defendant states: "The cole and only ouesti i
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time of entering into the contracts with the defendant." Flintiff concedes that the burden of growing his infancy by a preponderance of the evidence was upon him. Defendant's sole contention is that "the plaintiff failed to prove by a preponderance of the evidence the fact that he was a minor." In passing upon this contention we have seen fit to read the entire stenographic report of the proceedings before the trial court, and after a careful consideration of all the facts and circumstances we are satisfied that we cannot hold that the finding of the trial court is manifestly against the weight of the evidence.

The judgment of the Eunicipal court of Chicago is affirmed.

JUNEAU AFFIRMED.

Sullivan, F. J., and Friend, J., concur.

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PEOPLE OF THE STATE OF ILLINOIS.

Defendant in Error,

YS.

OTTO R. DANNIES,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

287 I.A. 6344

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On June 7, 1935, a verified information was filed against defendant, in the Municipal court of Chicago, which charges that he. on May 7, 1935, in the city of Chicago "willfully and unlawfully did make, draw, utter and deliver to this affiant a certain bank check for the payment of money, drawn upon kid-City National Bank, City of Chicago, and did thereby obtain from this affiant the sum of Fifteen and 00/100 Dollars, lawful money of the United States of America, the personal goods, money and property of the aforesaid Edward Tess, this affiant, the said Otto R. Dannies then and there well knowing at the time of making, drawing, uttering and delivery of the aforesaid check. that he did not then and there have sufficient funds on deposit in the said bank, or credit with said bank for payment in full of aforesaid check upon its presentation in due course of business at said bank, all with the intent then and there to cheat and defraud the said Edward Tess this affiant, contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the People of the State of Illinois." As soon as/information was filed defendant was brought to trial. He plead not guilty, waived a trial by jury and the cause was tried by the court. No transcript of the evidence has been filed in this court. At the conclusion of the hearing a judgment was entered which adjudged "that said defendant is guilty of the criminal offense of obtaining money by means of false pretenses

FOR STATE PROPLE OF THE ILLINOIS, Defendant in Trop, .27 OTTO R. DAMNIES AR. JUSTICE SCARLES DELIVIT On June 7, 1935, a vertil 1. 1. 1. 1. 1. 1. 1. 1. 1. defendant, in the Municipal cours of Chics , . i.a. .. Tgos and he, on May 7, 1935, is the sity of cliested the colony lawfully did make, draw, utter of the contract of the silling certain bank check for the population of, the actual party Wational Bank, City of Chicago, as Williams orders are in the control of the cont affignt the sum of Fifteen and co/Lo boarter, a class and trailite the United States of America, to the aut and bestinu end property of the sforegaid Waterd Lees, . It is it, ite a to Otto R. Dannies tron and them well would at the mer at making, drawing, uttering and deliver, of the efficient one; that he did not there earl there is no little to the list on appeals in the said bank, or credit with teles and page 12 - 2 of eforesaid check upon its presenterion in the court ness at said bank, all will the interior and defraud the said advard tea will will of busing form of the Statute in such care the the peace and digning of the color As soon as /information van files des He plead not builty, whited a trial of tried by the court. . . o transcri as the

filed in this court, at the court sign of the rain a farman was entered which notice of the sair of the court of the court

with intent to cheat and defraud on said finding of guilty," and defendant was sentenced to confinement in the House of Correction for the term of one year and to pay a fine of one dollar and the costs of the suit. To reverse the judgment defendant has sued out this writ of error.

The reason for the failure of The People to file an appearance or a brief in this court is obvious. The information charges defendant with the violation of par. 164 of the Criminal Code, "An Act to punish the making, drawing, uttering or delivering of checks, drafts or orders for the payment of money with intent to defraud," but the judgment adjudges the defendant guilty of an entirely different offense, viz., obtaining money by means of false pretenses with intent to cheat and defraud. (See par. 228, Criminal Code.) A defendant cannot be lawfully sentenced for an offense not charged in the indictment or information.

The judgment of the Municipal court of Chicago is reversed, and the cause is remanded for a proper disposition of the case.

JUDGMENT REVERSED AND CAUSE REMANDED.

Sullivan, P. J., and Friend, J., concur.

with intent to cheat and estrand on each fills, "...", ".d defendant was sentenced to (childenth in the term of one year and to day a fine of the suit. To reverse the filtered (after this writ of error.

The reason for the culture of the Person in the compensance or a brist in sais that is choiced the control observes defendant ith the point, the off of of or the control of an Act to punish the contin, there is, the control of an antirely different offers, the control of an entirely different offers, the control of these protences with intent to control of the entirely different offers, the control of the entirely different of the control of the entire of the entire of the control of the entire of the control of the control of the entire of the control of

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Sullivan, P. J., and driend, J., concur.

AT A TERM OF THE AFFELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in the year of our Lord one thousand nine hundred and thirty-six, within and for the Second District of the State of Illincis:

Present -- the Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk. 287 I.A. 635 RALPH H. PESPER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

IN THE APPELIATE COURT OF ILLINOIS SECOND DISTRICT OCTOBER TERM, A. D. 1936.

| BAHR CHEESE COMPANY, Corporation, | ε.) | |
|--------------------------------------|-------------|--|
| vs. FREDA RENTER, | Appellee, | APPEAL FROM CIRCUIT COURT STEPHENSON COUNTY. |
| | Appellant.) | |

HUFFMAN - P.M.

Appellee brought its bill of complaint against appellant and others, for an accounting and other relief, praying that an injunction be issued restraining appellant from voting 55 shares of stock of the F. J. Kolb Cheese Company, at any meeting or meetings held by said company. Pursuant to the complaint and affidavit, a temporary writ issued without notice and without bond, restraining the appellant-from voting the 55 shares of stock at any meeting of the corporation for the purpose of voting upon a dissolution thereof, or for any other purpose, until the further order of the court. Motion was filed to dissolve the temporary writ, which motion was denied. The appellant has prosecuted this appeal from the order of the court denying said motion. It is stated by appellant that the only contention is the right of the court to issue

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njunction be issued realized

ne appellant from voting to discuss a

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the injunction without notice and without bond.

It appears that in 1934, appellee corporation together with appellant and her brother, William Kolb, formed a corporation known as the F. J. Kolb Cheese Company; that appellant is the owner of 63 shares of the capital stock of said Kolb Cheese Company, William Kolb, her brother, the owner of 62 shares, and that appellee corporation is the owner of 125 shares; that F. J. Kolb is the father of William Kolb and the appellant; that appellant, William Kolb, F. J. Kolb, and others, had maliciously and intentionally violated their fiduciary capacity as officers and directors of the said corporation, and that they had wrongfully and without authority and without any consideration, issued to appellant a stock certificate for 55 shares of stock therein, which it is alleged is the property of appellee and that appellee is the legal holder and owner thereof and entitled thereto; that the said certificate was so issued contrary to the minutes of the corporation; that appellee has requested the issuance of same to it, which request has been refused; and that the defendants also refuse to cancel the certificate as above issued to appellant for which no consideration was paid. The bill sets up many alleged wrongful and fraudulent acts on the part of the defendants in the conduct of the business of the Kolb Cheese Company. More than fifteen various kinds of relief are prayed for. It is alleged that the defendants who constituted the Board of Directors, had adopted a resolution for the dissolution of the Kolb Cheese Company, and that the appellant would vote the 55 shares of stock, which did not belong to her (but to appellee), for the dissolution of said corporation; and if she be permitted to so vote said shares, that irreparable injury would result to appellee. The complaint was supported by affidavit to the effect that the plaintiff would be unduly prejudiced and suffer

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nds of relief are product. The constituted free constituted free constituted free constituted free constituted free constitutes on the constitute of the constitute of the constitute constitute of the constitute

irreparable injury unless the writ issued without notice.

Cases involving the right of a court to issue an injunction without notice and without bond depend upon the facts in the particular case. It is a question that must be determined by the court from the facts appearing in the bill and its accompanying affidavit. It may be stated as a general proposition that the granting or refusal to grant such an injunction, rests in the sound discretion of the trial court, and its action should not be disturbed in the absence of an abuse of such discretion. City of Kewanee v. Otley, 204 Ill. 402, 408. It is apparent in this case that the purpose of appellee was to keep the property rights of the parties in status quo until the determination of the merits of the controversy. Where it appears that this is important to the final determination of the cause, an injunction will be employed for that purpose. Young v. Federal Union Surety Co. 183 Ill. App. 278; Swift v. McCormick,

We think it sufficiently appears that the rights of appellee might have been unduly prejudiced if notice had been required, and see no good purpose why the court should have required a bond. Under such circumstances, the preliminary injunction was proper and the order of the trial court denying motion to dissolve same for

121 Ill. App. 556; Skelers v. Meyer, 246 Ill. App. 18.

the reasons assigned, is affirmed.

Order affirmed.

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| STATE OF ILLINOIS, |] |
| SECOND DISTRICT | ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court. in and |
| for said Second District of th | e State of Illinois, and the keeper of the Records and Seal thereof, do hereby |
| certify that the foregoing is a | true copy of the opinion of the said Appellate Court in the above entitled cause. |
| of record in my office. | |
| | In Testimony Whercof, I hereunto set my hand and affix the seal of said |
| | Appellate Court. at Ottawa, thisday of |
| | in the year of our Lord one thousand nine |
| | hundred and thirty |
| | Clerk of the Appellate Court |

(73815-5M-3-32) -7



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in the year of our Lord one thousand nine hundred and thirty-six, within and for the Second District of the State of Illincis:

Present -- the Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DCVE, Justice.

Hon. FRED G. WOLFE, Justice. 287 I.A. 635

JUSTUS L. JOHNSON, Clerk.

RALPH H. FESPER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On NOV 30 1936 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, tc-wit:

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IN THE APPELLATE COURT OF ILLINOIS,

SECOND DISTRICT

OCTOBER TERM, A. D. 1936.

T. A. RICHEY, for the use of NATIONAL

FIRE INSURANCE COMPANY OF HARTFORD, a

Corporation,

Appellant,

vs.

APPEAL FROM CIRCUIT COURT

HENDERSON COUNTY.

Appellee.

HUFFMAN - P.J.

T. A. Richey lived in the village of Stronghurst in Hemderson county. He was engaged in the business of operating a public garage and automobile repair shop, selling automobiles, tractors, and farm implements. He had a contract of insurance relative to the above business, with appellee. Richey owned a fee grinding outfit, consisting of a truck, gascline engine, and grinder. On January 26, 1932, he was operating this feed grinder on a farm owned by D. N. Cortelyou. He was at that time engaged in grinding feed for hire for Mr. Cortelyou. The gas engine ignited, set fire to the barn in which the grinding was going done, and the barn was destroyed by fire. Mr. Cortelyou had his property insured with appellant company. It paid his loss under its policy, in the sum of \$1474.

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L P. J. UNOSEC

T. A. RICHEL, for the use of free Res INSURANCE COLUMN OF STATES OF THE COLUMN OF STATES OF THE COLUMN OF THE COLU

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Subrogation contract was made by Mr. Cortelyou to appellant company. Thereafter, appellant brought its suit against Richey to recover the amount previously paid by it. Richey notified appellee company of this suit. It advised him that it had no interest in the claim; that his policy did not cover such a loss as was incurred by Mr. Cortelyou, nor the risks incident to the work in which Richey was engaged at the time of the fire, and advised him that he would have to look after the suit himself. Appellant obtained judgment against Richey for the sum demanded. It was unable to collect anything thereon from him, whereupon appellant instituted this suit as a garnishment action against appellee company to recover the aforesaid judgment obtained by it against Richey.

Appellee in this suit filed its answer denying that it owed Richey anything. The cause was heard by the court. The trial court held there was nothing due Richey under the terms of his contract of insurance with appellee company, and rendered judgment in this action that the garnishee defendant go hence without day and that the plaintiff take nothing by its writ. The appellant prosecutes this appeal from the judgment of the court.

The disposition of this case depends wholly upon the contract involved. The provision thereof with reference to the operations specified therein appear in the paragraph entitled "Operations." This paragraph is as follows:

"All work incidental and necessary to the conduct of the Assured's business of operating Automobile Sales Agency, Public Garage and Automobile Repair Shop, including the operation of any style, type or make of automobile, tractor, or trailer, for all purposes in such business and for pleasure use, and including the liability of the Assured arising by or through any automobile, tractor, or trailer, sold, repaired or overhauled by the Assured, but not the carrying of passengers for a consideration or the renting or hiring of automobiles to others (whether such use involves

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the carrying of passengers or the carrying of property), except such transportation or delivery of goods or merchandise for prospective purchasers as is strickly incidental to the demonstrating and sale of automobiles."

We find nothing in the contract to cover the grinding of feed for hire such as Richey was engaged in at the time of the fire. Neither does it appear that such a provision was contemplated or intended thereunder.

The judgment of the trial court is affirmed.

Judgment affirmed.

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| TATE OF ILLINOIS, | SS. I IUSTUS L IOHNSON Clork of | |
| SECOND DISTRICT | I, JUSTUS L. JOHNSON, Clerk of | the Appellate Court, in and |
| r said Second District of the | e State of Illinois, and the keeper of the Records | and Seal thereof, do hereby |
| rtify that the foregoing is a | true copy of the opinion of the said Appellate Court | in the above entitled cause, |
| record in my office. | | |
| | In Testimony Whereof, I hereunto set my hand | l and affix the seal of said |
| | Appellate Court, at Ottawa. this | day of |
| | | our Lord one thousand nine |
| | hundred and thirty | |
| | Clerk of the A | nnellata Claunt |



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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in the year of our Lord one thousand nine hundred and thirty-six, within and for the Second District of the State of Illinois:

Present -- the Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk. 287 I.A. 6353
RALPH H. PESPER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On NOV 30 1936 — the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:



IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A.D. 1936.

| BERNICE | SIMMONS, | Appellee,) | | | | | |
|----------|----------|-------------|--------|------|---------|-------|--|
| | Vs. |) | APPEAI | FROM | CIRCUIT | COURT | |
| HARRY E. | NICHOLS, | Appellant.) | | KANE | COUNTY. | | |

HUFFMAN - P.J.

This was an action by appellee against appellant to recover damages for personal injuries sustained by appellee while riding in an automobile with appellant, as his guest. The cause was tried by a jury, which returned a verdict in favor of appellee for the sum of \$5,000. Judgment was entered on the verdict. Appellant appeals therefrom.

Appellant urges that the trial court erred in refusing to grant his motions for a directed verdict; that the court erred in admitting certain evidence for appellee; and that the verdict is against the manifest weight of the evidence.

Appellant was trying out a new automobile with a view to purchasing the same. He invited appellee to accompany him for a ride. Appellee states she admonished the appellant against fast driving before starting on the ride, and that during the progress of the ride she made requests upon him to slow down and to reduce

RMICE SIMPONS,

ERY E. PICHOLS,

FEMAN - :. J.

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This was an action by an estate appellant to cover demages for personal injuries cast it ad by ancelles while ding in an automostle with somether the cast of the cover of the duny, which resurned a variable in favor of accellent the sum of about Judgment and entered and acceptable.

pellant appeals therefore.

Appellant arges bho: the origin of area in reformations.

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purchasing the asso. He involve could not see Sacrossinide. Appelles states and account to the could before starting on his ride, and the his of the course

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the speed of the car; but that appellant persisted in driving at a high rate of speed in disregard of her protests, and while so operating the car in such reckless manner, he drove it over three dogs which were upon the highway, whereupon he lost control of the car, ran off the road and struck a tree of approximately two feet in circumference, breaking down the tree and seriously injuring appellee.

The accident happened on October 13, 1933, at about three-thirty in the afternoon, on a paved state highway outside the city of Aurora. Appellee states the dogs were first seen from eight hundred to a thousand feet from the car, and that she called appellent's attention to them. Notwithstanding this situation the appellant continued to operate the automobile at such a speed and in such a manner that he ran into and over the dogs thereby losing control of the car and causing appellee's injuries, which caused her confinement in the hospital for ten weeks. She was unconscious for eighteen days and delerious for eight weeks after the accident. Subsequently she was confined to her bed at her home for two months. She was still unable to do her house work at the time of the trial and so permanently impaired as to almost be incapacitated.

We are in accord with the ruling of the trial court in denying appellant's motion for directed verdict at the close of appellee's evidence and again at the close of all the evidence. From a reading of the record we are of the opinion there were sufficient facts to cause the case to be submitted to the jury.

The introduction of evidence complained of by appellant consists of that of a bankruptcy schedule prepared by him and filed in the United States Court for the Northern District of

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naists of that of a conformacy we have a second of the budled in the United of the Charles of according to the Conformacy Illinois, wherein he scheduled as unsecured creditors the hospital, the nurses, and the doctor who attended appellee, following her injuries. Counsel for appellant objected to the introduction of this schedule, which objection was overruled. Appellee had already introduced evidence showing that appellant had paid these same nurses a part of their charges for attending her. No objection was made to this evidence. Subsequently, counsel for appellant, upon cross examination of Dr. Murphy proved payments by appellant to the doctor and to the nurses for their attendance upon appellee.

Declarations against interest or admissions of the

adverse party, are generally admissible against him. Evidence of the conduct of a person after a transaction, is admissible to disprove the position he takes in a litigation involving such transaction. Ikenberry v. New York Life Ins. Co. 127 Minn. 215, 139 N.W. 292; Bernasconi. V. Bassi, 261 Mass. 26, 158 N.E. 341. Evidence of acts by defendant tending to show that he was to blame for an accident, or tending to show an admission of liability. are proper, even though some objectionable features may attend the admission of such evidence, when there is nothing to show prejudice on the part of the jury, and the other evidence in the case amply sustains the verdict. Under such circumstances, the incidental errors should not reverse a judgment. Robins v. Weed (Iowa) 169 N.W. 772. Acts or statements by a party following an automobile collision, which tend to prove a consciousness of recognition of liability for the damages incurred, are generally permissible on the theory of an admission. Marmen v. Haas, 80 A.L.R. 1131, 241 N.W. 70; State v. Anderson, 65 A.L.R. 1307,

227 N.W. 220; Rentz v. Collins (Ga.) 181 S.E. 678.

llinois, wherein he scheduled as measured orseisors the heapits., he nurses, and the doctor who ettended absolies, following her njuries. Counsel for appeilant objected to the introduction of his schedule, thish objects on new vertal at the eller had all easies eaty introduced avisance should the fact of seller had as such of their chart of the eller had appearance to the fact of the country of the electric day of the electric day of the electric day of the country of the doctor and to the nurses for there had been and to the eller.

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The introduction of the bankruptcy schedule was admitted in evidence by the trial court upon the theory that it was a circumstance tending to show a recognition of liability on the part of the appellant and proper as an admission. The only probative force of such exhibit was to tend to prove that appellant assumed or recognized liability for the expenses of the doctor, hospital and nurses incident to appellee's care and treatment therein. Evidence to this effect had previously been introduced without objection. It appears that appellant began paying appellee's hospital expenses about a week after her entrance the reto, and that he paid each of the nurses at that time, the sum of \$42. Appellant, upon cross examination of Dr. Murphy proved the amount of the hospital bill to be \$450; the amount of the doctor's bill to be \$775; that there was due one nurse the sum of \$396; and to another nurse the sum of \$390; and that appellant had paid the doctor the sum of \$140 upon his bill and had paid to each of the

The admission of incompetent evidence, is not necessarily prejudicial error where there is plenty of other evidence to prove the same fact. The items listed in the schedule relative to the hospital, nurses, and doctor bills, were merely corroborative of the evidence previously introduced by appellee showing the conduct of appellant in the payment of these bills, and of that subsequently introduced by appellant to the same effect. An objection to testimony will not be considered on appeal where the same testimony has been previously received in evidence without objection. Butler v. National Live Stock Ins. Co. 200 Ill. App. 280, 288; Graham v. Mattoon City Ry. Co. 234 Ill. 483, 489. Due to the fact of appellant's

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evidence by the brial court man the theory what it was a parametric about the short of the short on the short of such exhibit was to tend to the tend to the

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acts and conduct in making payment of the bills, being previously introduced in evidence without objection, we are not of the opinion that the introduction of the bankruptcy schedule, tending to prove the same thing, constitutes error. For a further reason, the appellant introduced by the doctor, evidence of the same facts as those reflected by the schedule. Appellant should not be heard to complain of the introduction of evidence by appellee when he subsequently makes proof of the same state of facts. We are of the opinion that the error, if any, in the introduction of the schedule, was lost when the appellant failed to object to the introduction of such proof in the first instance, and afterwards proceeded to make proof of the same facts and conduct. Gruver v. City of Dixon, 85 Ill. App. 79, 81.

A record need not be free from all error. If it appears therefrom that a just conclusion has been reached, founded upon competent and sufficient evidence, and that no error has occurred which might have been prejudicial to the appellant's rights, the judgment should be affirmed. Hodges v. Percival, 132 Ill. 53; People v. Schueneman, 320 Ill. 127; People v. Hoffee, 354 Ill. 123; People v. Nusbaum, 326 Ill. 518.

The record discloses sufficient other evidence, in addition to the schedule, to justify the finding of the jury. The judgment of the trial court is therefore affirmed.

Judgment affirmed.

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| STATE OF ILLINOIS, |] |
| SECOND DISTRICT | ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and |
| or said Second District of t | he State of Illinois, and the keeper of the Records and Seal thereof, do hereby |
| | true copy of the opinion of the said Appellate Court in the above entitled cause. |
| of record in my office. | |
| i iccord in my omoci | In Testimony Whereof, I hereunto set my hand and affix the seal of said |
| | Appellate Court, at Ottawa, thisday of |
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| | in the year of our Lord one thousand nine |
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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in the year of our Lord one thousand nine hundred and thirty-six, within and for the Second District of the State of Illinois:

Present -- the Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. PESPER, Sheriff.

287 I.A. 6354

EE IT REMEMBERED, that afterwards, to-wit: On NOV 30 1936 — the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

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IN THE APPELLATE COURT OF ILLINOIS,

SECOND DISTRICT

OCTOBER TERM, A. D. 1936.

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel., MICHAEL J. CHARLEY, as Supervisor, etc.,

Appellee,

vs.

VICTOR J. BEAUMONT, Town Clerk in and for the Town of LaSalle,

Appellant.

APPEAL FROM CIRCUIT COURT, LASALLE COUNTY.

HUFFMAN - P.J.

This is a mandamus proceeding brought by appellee as supervisor and ex-officio treasurer of the road and bridge fund of the town of LaSalle, in LaSalle County, against appellant as town clerk of said town, to compel him to countersign a warrant for the payment of the annual premium on appellee's bond as treasurer of the road and bridge fund of said town. Appellee had been supervisor of the town of LaSalle since 1908, except for one two-year term. petition among other things, sets out that appellee was last elected to said office on April 4, 1933; that at said time, the appellant was reelected as clerk of said town; that appellee qualified and furnished bond in a surety company, which bond was duly approved; that the first year's premium thereon was paid by said town by means of a warrant drawn and countersigned by appellant, as town clerk, signed by the Commissioner of Highways and paid by appellee as treasurer of the road and bridge fund; that the second year's premium is now due and payable; that the claim has been

GEN. MO. 9128 , THE TO CHAIR S. FEE MI SECOND D 11 12 THE PROPIA OF THE CIVER OF HIS extract, There extract, Supervisor, etc., , r Liench VICTOR J. HEAUMOHF, down Clerk in and for the Town of Laballe, .Jr .J. Jan . HUPWAN - P.J. Tois in a mandamus proceeding trought by conciler as sur zvisor and ex-officio treasurer of the coafficionides fund of the town of labelle, in amballe Conner, gainer as a man of the of seld to war, to compel him to countries in volument for the of the apparl premium of applying the each premium of the and bridge func of a ld torm. town of satelle will allow to meet the petition amon other whings, set set for The action of the contract force for a li tic rate in bullicer any inclingqu

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audited and approved by the Board of Town Auditors and ordered paid: that a warrant for the amount (\$450) has been drawn by appellant, as town clerk, signed by the Commissioner of Highways, and upon being returned to appellant, as town clerk, along with other warrants, to be by him countersigned, that he refused to countersign the warrant in question for the payment of said premium; that repeated demands have been made upon him, and that he persists in his refusal to countersign the warrant and deliver same to the Highway Commissioner or to appellee in order that it might be paid; and that the surety company is threatening to cancel the bond. Other pertinent allegations are contained in the petition and amendment thereto. Demurrers were filed to the petition and amended petition, which were overruled. A series of answers and amended answers were filed by appellee to the petition and amendment. Demurrers were sustained to these answers. At the March term, 1936, the last order was entered striking the answer of appellant. Leave was given appellant to file further enswer by May 27, 1936. He filed no answer. On June 1, 1936, written notice was given him that appellee would appear before the court on June 5, 1936, at ten c'clock A.M., on a hearing on the petition. The appellant did not appear and order of default was entered against him for want of an answer. The is sues were found for the petitioner and order entered for the writ as prayed. Appellant prosecutes this appeal from the judgment of the

Appellant prosecutes this appeal from the judgment of the court awarding the writ. Appellant argues as grounds for reversal that an adequate remedy at law was available; that this is an effort to collect a civil debt by way of mandamus; and that mandamus will not issue until judgment at law is first had for the amount claimed due.

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due.

One who submits to a default, upon appeal, will be held to have admitted all that is well alleged against him. Roe v. County of Cook, 358 Ill. 568, 570; Seither & Cherry Co. v. Board of Education, 283 Ill. App. 392. Under the statute (Sec. 9, Ch. 87), the writ of mandamus will be allowed where it will afford a proper and sufficient remedy, even though the petitioner may have another specific legal remedy. People v. Kent, 300 Ill. 324, 333; People v. Czaszewicz, 295 Ill. 11, 17; People v. Sullivan, 339 Ill. 146, 156; O. & M. Ry. Co. v. People, 121 Ill. 483.

In an appeal of this nature from a default judgment, upon review, the appellant is bound by the sufficiency of the cause as stated in the complaint or petition. Seither & Cherry Co. v. Board of Education, Supra; Roe v. County of Cook, Supra. Where the claimant by the allegations of the petition has shown a clear right to the payment of a definite amount, which is wrongfully withheld, and a plain duty exists on the part of the defendant to act, the fact that an action in debt or assumpsit might be an available remedy, is not sufficient grounds to defeat a petition for mandamus under circumstances such as exist in this case. People ex rel Hamilton v. City of Chicago, 274 Ill. App. 206. The allegations of the petition stand undisputed. This state by statute has liberalized the action of mandamus to the extent that in cases of this character, when the clear right is sufficiently shown, the action will lie as a speedy, convenient and adequate remedy, even though other specific remedies may be available. The reason for this rule is expressed in People ex rel v. Getzendaner, et al., 137 Ill. 234, 262.

We are of the opinion that the trial court properly exercised its discretion in awarding the writ herein. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

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| TATE OF ILLINOIS, | · · |
| SECOND DISTRICT | ss. I. JUSTUS L. JOHNSON, Clerk of the Appellate Court. in and |
| r said Second District of th | ne State of Illinois, and the keeper of the Records and Seal thereof, do hereby |
| rtify that the foregoing is a | true copy of the opinion of the said Appellate Court in the above entitled cause. |
| record in my office. | |
| | In Testimony Whereof, I hereunto set my hand and affix the seal of said |
| | Appellate Court, at Ottawa. thisday of |
| | in the year of our Lord one thousand nine |
| | hundred and thirty |
| | Clerk of the Appellate Court |
| 738155M3-32) | |

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in the year of our Lord one thousand nine hundred and thirty-six, within and for the Second District of the State of Illinois:

Present -- the Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DCVE, Justice.

Hon. FRED G. WOLFE, Justice.

RALPH H. PESPER, Sheriff.

JUSTUS L. JOHNSON, Clerk. 287 I.A. 636¹

BE IT REMEMBERED, that afterwards, to-wit: On the opinion of the Court was filed in the NOV 3 0 1936 Clerk's office of said Court, in the words and figures following, tc-wit:

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

October Term, A. D.1936.

HARRY L. TOPPING,
Appe

VS.

Appellee,

WILLIAM B. WARD,

Appellant.

APPEAL FROM THE COUNTY COURT
OF KANKAKEE COUNTY.

DOVE, J.

Harry L. Topping, Jr. was driving a Plymouth sedan automobile south on State Route No. 25 on the evening of July 5, 1935, accompenied by Mary Limerick, who sat in the front seat at his right, and by Max Stentz and Marjorie Bobbitt, who occupied the rear seat. They left Kankakee about eight thirty in the evening and had proceeded south along Route No. 25 several hundred feet south of the Kankakee airport and were in the act of making a left turn in order to enter an intersecting macadam road running in an easterly and westerly direction when the right front end of William B. Ward's Mash seden, which was being driven by Mr. Ward along said route in a southerly direction, collided with the left rear end of the Topping car, knocking it across the macadam road and turning it over. This suit was the reafter instituted before a Justice of the Peace by the father of Henry L. Topping, Jr., who owned the car which his son was driving, to recover from Ward the damages he sustained by reason of his car being injured in the collision. Upon an appeal from the judgment rendered by the justice, a trial

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was had in the County Court, a jury being waived, which resulted in a judgment in favor of the plaintiff for \$168.81 and the defendant has prosecuted this further appeal.

The driver of the Topping car testified that as he proceeded south from Kankakee, he was going between twenty and twentyfive miles per hour and that when he came to a point about ten feet north of the north edge of the intersection he slowed his car down to between fifteen and twenty miles per hour, and that he then turned his car to the left and had crossed the black line which marked the center of the concrete pavement and had his car pointed in a southeasterly direction and was entirely in the east traffic lane when the collision occurred. He further testified that he observed in his rear-view mirror the lights of the Ward car approaching from the rear, but had no judgment as to how far north of his car it was when he first observed it. That when he looked in his mirror again, the Topping car was about three hundred feet from the intersection and the Ward car back of him travelling in the west traffic lane, but much closer than when he first observed the lights of the Ward car. That when he, Topping, was about one hundred feet north of the north lane of the intersection, he again observed the Ward car in the mirror and noticed it was much closer but estimated that it was then about three hundred feet in his He further testified that just before he made the turn he again looked in the mirror to see where the Ward car was and noticed that it was about fifty feet behind blue and that as he turned he heard the "honk" of the "ard car and a second or a couple of seconds later the collision occurred. He further testified that when he was about fifty feet north of the intersection, he put out his left hand for a couple of seconds and kept it out until he started to make the turn. In answer to the question: "Did it occur

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to you as you approached the intersection that that car might attempt to pass you as you were going along there?", the witness answered: "If I would have gone further it would have passed me, but I was going to turn right there. I didn't think it would pass me", and at the trial before the justice he added: "I thought I could get to the intersection before".

Mary Limerick testified that when the Topping car, in which she was riding, approached the intersection, Henry Topping, Jr., the driver thereof, told the passengers that he was going to turn to the left and when he was fifty or seventy-five feet north of the north line of the intersection, he took his left hand off the steering wheel and put his hand out the window opening and signalled the turn and then drew his hand in and took hold of the steering wheel with both hands and turned the car so that it faced in a southeasterly direction and the front end of the car had proceeded almost off the pavement when the collision occurred.

Mas Stentz testified that he was sitting on the right side of the rear seat of the Topping car, didn't observe whether the driver put out his hand or not before the turn was made, but felt the car turn, heard a honk and the next thing was the collision.

The plaintiff testified that he went to the scene of the accident shortly thereafter and observed skid marks on the east side of the pavement, starting about sixty-five feet north of the north line of the intersection and ended right at the intersection. He described the location and appearance of the cars as he observed them and testified that a day or so later the defendant told him an a conversation relative to the accident that he was going about fifty-five miles per hour.

The defendant testified in his own behalf that when he first observed the Topping car it was about five hundred feet in front of him and at that time the defendant was driving at the rate

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of fifty-five miles per hour, going south on the west side of the pavement, that there were no other cars in the highway, that the Topping car was proceeding slowly and he, Ward, slowed down five or six miles per hour, sounded his horn when between one hundred and one hundred twenty-five feet from the Topping car, and proceeded south. That he again sounded his horn when he was within sixty-five or seventy feet of the Topping car and while the Topping car was still in the west lane. That he, Ward, then proceeded to the east lane and started to pass, driving at that time about forty-five miles per hour. That when he was within twenty to twenty-five feet from the Topping car, it suddenly turned to the east. That he, Ward, immediately applied the brakes and the front end of his car stopped after the collision about five feet south of the north side of the intersection. witness further testified that the collision occurred at or very near the north line of the intersection and that from the time he first observed the Topping car he watched it very closely and that no signal was ever given by anyone of the intended turn. He further testified that his statement to the pleintiff after the accident was that he was driving at the rate of fifty-five miles per hour-when he first observed the Topping car and at that time the Topping car was about five hundred feet away.

There is no necessity of setting out in rullthe testimony of Chester Davis, Humphrey Christiansen, Donald Wilkin and Pete Dato, who were passengers in the Ward car and whose testimony we have carefully read. Their evidence substantially corroborates the testimony of appellant.

It further appears from the record that the collision occurred a few minutes before nine o'clock in the evening, that the

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pavement was dry, the weather warm, the windows of the Topping car were down, the tail light on the Topping car was not burning, its headlights were, as were the headlights on the Ward car, and there were no other cars or traffic upon Route No. 25 or the intersecting macadam road, which was either fifty or fifty-seven feet in width, according to the testimony. The evidence is conflicting only upon the question whether the driver of the Topping car signalled his intention to turn and the rate of speed at which appellent's car was being driven before and at the time of the collision. Upon both of these questions the weight of the evidence, in our opinion, sustains the contention of appellant. The fact that appellent's car did not travel more than five or six feet after the collision tends to corroborate his contention.

This judgment cannot be sustained unless it affirmatively appears that the driver of appellee's car was in the exercise of due care for its safety and that the proximate cause of the damage to his automobile was the negligence of appellant. At the time of this collision our Statute provided that any person operating a motor vehicle should, at the intersection of public highways, pass to the right of the center of such intersection when turning to the left. The driver of the Topping car testified that he began making the turn to the left ten feet north of the north line of the intersecting Macadam road and had turned into the east traffic lane before he entered the intersection. The collision occurred, according to all the testimony, north of the north line of the intersection. Topping, the driver of appellee's car, testified that appellant's car moved about five or six feet after the collision and the testimony of all the witnesses is that the front end of appellant's car, when it stopped, was either at the north line of the intersection or

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Noth of these specifies the side of states and states as a specific transfer of the souther tion of social and the solution of the states as a state of the states and the states as a state of the states and the states as a state of the states and the states as a state of the states and the states are states as a state of the states are states are states as a state of the states are states are states as a state of the states are states are states as a state of the states are states as a state of the states are states as a state of the states are states are states as a state of the states are states as a state of the states are states are states are states are states as a state of the states are s

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not to exceed six feet to the south thereof. Had the driver of appellee's car obeyed the provisions of the Statute as it then provided and remained in the west traffic lane until he had gone beyond the center of the intersection, this accident would not have occurred. Furthermore, according to the testimony of the driver of appellee's car, he commenced to make the turn at a time when he observed the car of appellent approaching rapidly from the rear and when it was only about fifty feet behind him and according to the greater weight of the evidence appellant's car was then in the east traffic lane and the driver of appellee's car must have so observed it.

Counsel for appellee, in commenting upon this testimony of the driver of appellee's car, states that the record does show that he testified that he started to make the turn to the left when appellant's car was about fifty feet in his rear, but counsel insist that "Topping, Jr. either misspoke or the court reporter made an error", because he also testified in response to other questions that appellant's car was from one hundred to one hundred fifty feet back of him when he started to make the turn. Of course this court must be guided by the testimony as it appears in the record.

We recognize that the question whether appellant drove his car at a speed greater than was reasonable and proper, having regard to the traffic and the use of the way, or so as to injure the property of appellae was a question of fact to be determined by the trial court as was also the question whether the driver of appellae's car was in the exercise of due care at and just before the time of the collision, and we therefore hesitate to set aside the judgment entered upon the findings of the trial court. Our duty, however, under the law is plain, and being of the opinion that the

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judgment of the trial court is against the manifest weight of the evidence, that judgment must be reversed and the cause remended.

REVERSED AND REMANDED.

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| OMANDE OR TITINGE | |
| STATE OF ILLINOIS, SECOND DISTRICT | ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and |
| for said Second District of | the State of Illinois, and the keeper of the Records and Seal thereof, do hereby |
| certify that the foregoing is | a true copy of the opinion of the said Appellate Court in the above entitled cause. |
| of record in my office. | |
| | In Testimony Whereof, I hereunto set my hand and affix the seal of said |
| | Appellate Court. at Ottawa, thisday of |
| | in the year of our Lord one thousand nine |
| | hundred and thirty |

(73815-5M-3-32) -------7

Clerk of the Appellate Court



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in the year of our Lord one thousand nine hundred and thirty-six, within and for the Second District of the State of Illinois:

Present -- the Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice. 287 I.A. 6362
JUSTUS L. JOHNSON, Clerk. 287 I.A. 6362

RALPH H. PESPER, Sheriff.

EE IT REMEMBERED, that afterwards, to-wit: On NOV 30 1936 — the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

October Term, A. D. 1936.

LORETTA M. PENDERGAST,

Appellee,

vs.

APPEAL FROM THE CIRCUIT

COURT OF WINNEBAGO COUNTY.

Appellant.)

DOVE, J.

From a judgment rendered on the verdict of a jury in favor of the plaintiff for \$1248.00, the defendant appeals. The issues submitted to the jury were whether the defendant was driving his automobile carelessly and negligently and at a rate of speed greater than was reasonable and proper having regard for the traffic and use of the way at or near the intersection of West Jefferson and North Court Streets in Rockford on the evening of December 31, 1934, and whether, at that time and place, the plaintiff was in the exercise of due care for her own safety.

The evidence discloses that West Jefferson Street is a through street running east and west. It has a Macadam surface and is fffty-five feet in width between curbs. Court Street runs north and south, and is forty feet wide between curbs. Church Street runs parallel with Court Street and is a block east of Court Street. At the north-west corner of Church and West Jefferson Streets there is an oil

Table 1 of the PALLSTORA

LORETTA M. POST YRS 2005, COLL. SO., COLL. S

DOVE, J.

From a judgment randered or the vereict of the plaintiff for \$1348.00, the defendent of eith. The present for the jary were whether the carelessity and negligently and the the time are the incorrection of a confidence of the play of access of the play of access of the play of access of the confidence of the confidence

The oridence displaces that the follows that the structure to the struct running seas and there. It has the structure and the first permits of the structure of

Jefferson and Court Streets there is also an oil station, and between these oil stations on the north side of West Jefferson Street there are residences. A church stands on the northwest corner of West Jefferson and Court Streets and residences are on the remaining two corners, and on the south side of West Jefferson Street, east and west of the Court Street intersection, are residences.

Upon the evening in question, appellee, who lived on Court Street north of the West Jefferson Street intersection and was employed as a stenographer and bookkeeper at the Rockford Motor Hotel, accompanied by her aunt, Sarah Glynn, and a friend, Margaret Mani, was walking in a northerly direction on the sidewalk on the west side of Court Street, approaching this intersection en route to her home and as she started to enter the intersection, she testified that her right arm was interlocked into her aunt's left arm and she was walking a trifle ahead of her. That she stopped, looked west, then looked east, but saw no one coming from either direction. she then started across the street, her arms were then disengaged and she was walking a trifle ahead of both her companions. That when she arrived at the center of the street, she again looked east, saw nothing, and continued northward. When she arrived within eight or ten feet from the curbing on the north side of West Jefferson Street, she observed the lights of appellant's car shining on the pavement in front of her and she thereupon again looked east and at that time appellant's car, according to her testimony, was within ten feet of her. She heard no horn or noises, saw no other cars and recalls nothing else that happened. The other evidence, however, is that some part of the rear portion of appellant's car knocked her down and she was rendered unconscious and shortly thereafter taken to the hospital.

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Margaret Mani testified that she was six or ten feet behind appellee and Mrs. Glynn as they approached the intersection. when this witness stepped off the curb on the south side of West Jefferson Street and entered the pedestrian travelled portion of the intersection, appellee and Mrs. Glynn were in the middle of Jefferson Street. That when she, Miss Mani, arrived at the middle of that street, she looked east and saw appellant's car coming from the east "back of the oil station" on the north side of the center of Jefferson Street, that she, Miss Mani, then ran back to the southwest corner of the intersection and when she arrived there she heard a thud, turned around and saw appellee and Mrs. Glynn lying in the street. She was unable to state how fast the automobile was travelling when she observed it, but her answer that when she first saw appellant's car it was coming "awful fast" was permitted, over appellant's motion to strike the same, to stand. She further testified that she did not hear any horn or warning of the approach of appellant's car. A portion of the additional answer of appellant, which admitted that at the time and place in question and while appellant was driving his automobile westerly on West Jefferson Street, he saw three persons, then unknown to him, step into West Jefferson Street at the point where the west sidewalk line of Court-Street crosses West Jefferson Street, was read into the record. Mrs. Glynn did not testify in chief and the foregoing, together with the testimony of Dr. Goembel, who attended appellee after her arrival at the hospital, constituted the case for appellee.

Appellant testified that he was twenty-four years of age and on the night in question was driving his car west on West Jefferson Street toward the intersection of Court Street and that as he ap-

Margaret Mani tesker on the second tesker of the control of the co appe lee and Wrs. Glynn ec to the to core the . Let when this witness evenues of, as a state when Jefferson Street and Gutarad to Same Teers the intersection, are oblice or two classes or the Jefferson Otreet. The same the, it was early of that street, she leaded on the case that to from the east shae's wide of a contract of a section of center of Jefferson street, the ship is a mini, then i in the new terms the southwest corner of the factor ties and vist all remost several she heard a thud, turned around and the said of the said lying in the abacet. The man applied was the free than a trangbile was travelling the object to it, jut were to any one

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proached the intersection he was travelling fifteen miles per hour and about twelve feet south of the north curb line of West Jefferson Street. That he observed three women standing in the middle of Jefferson Street where the west sidewalk line of Court Street would be if it extended across West Jefferson Street, and that when he saw them he took his foot off of the accelerator and his car slowed That at this time his car was east a little, or just about even with the east sidewalk line of Court Street. That two of the women started to walk north from the center of the street on the sidewalk line travelling north, and when they reached a point in the street about ten feet from the north curb, the third lady was standing in the center of the street and there was space between her and the other two women for his car to pass. That he intended to do this but suddenly the two women started to go back to the center of the street and when they did this, he swung his car to the right, put on his brakes and the car went up over the curb. That the front of his car went past the two women on their right, but they were struck by some part of the rear portion of his car, but no part of his car, which was approximately ten or twelve feet long passed over appellee's body. That his lights were burning, his brakes were in good condition and that when the car came to a stop its right front wheel was on the Jefferson Street curb on the nor thwest corner, and appellee's body was lying about ten feet from the back of his car, and that her aunt was lying next to her.

Clell Burkey, who was with appellant in his car on the evening in question, corroborated appellant and testified that when appellee and her aunt were about ten feet from the north curb of Jefferson Street, he observed that they had their arms locked together, that

prosched the intermedia and service air if the right of and about twelve feet wouth out to morth outh lim of or t deflerent That he observed three tomen respects it the england Jefferson Strent where the west blocked bid at the stores and be if it extended across . Out defferage the sa, was the teacher the saw them he took his if of oif as sives a roce and his care is est That at this time his ear har associated to take the transfer to the transfer even with the east sidewalk line of Donco Coost. Then the of the women started to walk nowth from one engine of the area to by the sidewalk line trave lin, north, end when they cooked a soint in the street about tem feet from the noite and, whe wint lary has given ing in the center of the street and the remedence of the center the other two women for his our to gas. . I'as he intended to dais but suddenly the two women stanted to to look to to any more not the street and when they did this, he swax his ear to the right, out in his brakes and the car went on ever the cur . Las the front of his car went past the two wamen on their richt, on and ore ore the by some part of the rear octator of his car, but in this of the or, wie is a new war or not even aviewed no med y leteral xon up ass folder body. That his lights were burning, his brescontess in the occasition and that when the ear own to me stop it it is it. on the Jefferson Street ourb on the section of ner, the body was lying about twn feet from the love o all e.g. ac to there aunt was lying next to her.

Clell Burkey, who was with sort lant in its our to overing in question, corroborated annuals not and bestiff I that had that the call the call to a live and her aunt were about ten feet from the call to urb of lefters on Street, he observed that that there are local together the local together. The

they appeared to be excited and they started back south and were see-sawing back and forth and were jerking at each other. when they started back south, appellant turned his car to the notth and applied the brakes and that when the car stopped, the rear end of it was six or eight feet from the bodies of appellee and her aunt. The evidence is further that Court Street is forty feet in width between curbs and that West Jefferson Street is fifty feet wide from curb to curb and is a through street and signs so advising pedestrians and vehicular traffic appeared on each side of Court That as you looked each way from the intersection, the view was unobstructed both east and west for several blocks. Mr. Burkey further testified that there were no cars parked along the north curb of Jefferson Street near the intersection and that as appellant's car approached the intersection, it was travelling about eight feet south of the north curb line of Jefferson Street.

According to the testimony of the plaintiff, no cars were in West Jefferson Street as she entered and started to cross the intersection, either approaching from the west or the east. That she first became cognizant of the presence of appellant's car from the shining of its lights on the pavement in front of her, when she was within eight or ten feet of the curing on the north side of Jefferson Street. That when she stopped in the center of the street, she looked but did not see appellant's car. When Miss Mani first observed appellant's car it was back by the oil station. Miss Mani then turned around and went back to the curb and in doing so she travelled twenty-five feet. So while Miss Mani travelled twenty-five feet, appellant's car travelled the distance from where she observed it back of the oil station to the point of collision.

Just how far back of the intersection appellant's car was does not

they appeared to be excited as a cartest and appeared. The sewing book and forth a carte a carte a carte a carte and forth access, a call we carred a carte a carte book access, a call we carred a carte a carte access of the mess six or eight feet are an access of and a carte. The evidence is farther a call to the carte a carte a carte and another to carte and the carte access and access and the carte access access and access and access access and access and access access access access and access acces

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appear. The negligence charged was that appellant operated his automobile at a speed that was greater than was reasonable and proper, having regard for the traffic and the use of the way.

Other than the conclusion of Margaret Mani, that appellant's car was approaching "awful fast", there is no evidence to sustain this charge. The testimony of appellant and Mr. Burkey, the other occupant of the car, is that appellant was approaching this intersection at a rate of speed not to exceed fifteen miles per hour, and the physical fact that the car did stop within eight or ten feet after it had struck appellee tends to corroborate the testimony of appellant.

Appellant and the occupant of his car testified that appellee and her aunt, after coming within eight or ten feet of the north curb of West Jefferson Street, hesitated and started back south. Appellee and her aunt, in rebuttal, denied this and testified that they proceeded without stopping and without interruption from the time they left the center of the street until they were hit. In this connection it might be well to recall appellee's testimony in chief, in which she stated that when she arrived within eight or ten feet of the north curb she looked east, saw appellant's car within ten feet of her and recalls nothing further that happened. Furthermore, appellee testified that when she was in the middle of the street she looked but did not see appellant's car. no reason why she could not have seen it. It was there and her companion Margaret Mani saw it and escaped injury. Appellee therefore is in the same position as one who did not look because had she looked, she must have observed what necessarily must have been observable.

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Angle of the section and her sunt, after coring that he had a tor for the curb of est Jefferson in et. Estibute in an entre Appelles and her awat, in we would, or held with the they proceeded without utoward or the it intented to the best of the time they left the tender of the street and left je car this commection it mi 'm 'we well to recall a call the recall chief, in which she stated that then so arrive on ten feet of the court one col and term direction of the feet met within ton feet of her and recollered . The start terms Furthermore, consides to tipica that a none of the termore of the street she leaked but as a second of the conno reason why she could not new the the terms companion Margaret Mani day it one a de as indeme. · fore is in the same post ti more as the secretary as a 10 BBC looked, she must have observed about the error of the born of the

servable.

This judgment can not be sustained unless it affirmatively appears that appellee was in the exercise of due care at and just before she was injured, and further that the proximate cause of her injuries was the negligence of appellant. We recognize that these are questions of fact and we hesitate to set aside a judgment entered upon the findings of a jury which found both of these issues in favor of appellee. Our duty, however, under the law is plain and being of the opinion that this judgment is against the manifest weight of the evidence, it must be reversed and the cause remanded.

REVERSED AND REMANDED.

This judgment on rot of them of the correct of the organists appears that appelled was in all clears of all correct organizations of the injuries was injured, and find the solutions of the correct of the injuries was the negligoned of the correct organizations of focus and we best to be ablicated organizations of focus and we best to be ablicated organizations of the finditus and jury oblication of the finditus and jury oblication of the colution that this jets of the columns and the columns of the evidence, it is a series of the colution that this jets of the columns of the evidence of the columns.

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| STATE OF ILLINOIS, SECOND DISTRICT | ss. I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and |
| for said Second District of the | e State of Illinois, and the keeper of the Records and Seal thereof, do hereby |
| | true copy of the opinion of the said Appellate Court in the above entitled cause, |
| of record in my office. | |
| | In Testimony Whereof, I hereunto set my hand and affix the seal of said |
| | Appellate Court, at Ottawa, thisday of |
| | in the year of our Lord one thousand nine |
| | hundred and thirty |
| | Clerk of the Appellate Court |



HE APPELLATE COURT

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in the year of our Lord one thousand nine hundred and thirty-six, within and for the Second District of the State of Illinois:

Present -- the Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DCVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk. 287 I.A. 636

RALPH H. DESPER, Sheriff.

EE IT REMEMBERED, that afterwards, to-wit: On NOV 30 1936 — the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

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IN THE

APPELLATE COURT OF ILLINOIS SECOND DISTRICT

October Term, A. D. 1936.

MARGARET BODINE,
Appellant.

VS.

HARRY W. LLOYD,

APPEAL FROM THE CIRCUIT COURT OF STARK COUNTY.

Appellee.

DOVE. J.

On August 9, 1934, Margaret Bodine, Administratrix of the estate of Joseph C. Bodine, deceased, filed her complaint against Harry W. Lloyd in the Circuit Court of Stark County to recover damages for the alleged wrongful death of the said Joseph C. Bodine. The complaint began, "The plaintiff Margaret Bodine, administratrix of the estate of Joseph C. Bodine, deceased, complains of the defendant Harry W. Lloyd and says." It then alleged that during his lifetime, plaintiff's intestate and the defendant were both residents of this state, that on January 31, 1934, plaintiff's intestate was riding as a guest passenger in defendant's automobile, that defendant was driving the same on U. S. Route No. 36 near Lentner, in Shelby County, Missouri, that by reason of the careless and negligent manner in which the defendant drove said automobile, it was overturned and as a result thereof, plaintiff's intestate was fatally injured and then and there and within one year prior to the commencement of this suit died. The complaint set forth in haec verba a section of the Revised Statutes of Missouri, having to do

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MARCARET BOLL ...

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HARRY &. LLOYD,

Arpellee.

Appellent,

Etto, 10 am in and 1.5 COUNTY OF LANK, O DIET.

DOVE, J.

On August 2, 1934, Margaret Lodice, Administratrix of the estate of Joseph C. Rodine, decessed, filed her commaint against

Marry W. Lloyd in the Circuit Court of tark Joursy to recover damages for the slieged wrongful death of the said , Toseth J. . wilne. The complaint begar, "The plaintiff Margaret oding, administruix of the est to of Joseph W. Bodine, drocased, and kins of de-

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with the operation of motor vehicles in that state and averred a breach thereof and alleged that the rights and liabilities of the parties, plaintiff and defendant, are governed and controlled by the laws of the State of Missouri. The complaint then alleged that plaintiff's intestate left him surviving Margaret Bodine, his widow. but no minor children, and avers that said Margaret Bodine has, by the death of said intestate, suffered pecuniary loss and damage and under the laws and statutes of the State of Missouri is entitled to bring this action and have the sole benefit of whatever may be recovered, and tenders her Letters of Administration issued by the County Court of Stark County, Illinois, as evidence of her right to sue. On October 15, 1934, the defendant filed his answer to the complaint in which, among other things, he averred that the plaintiff, under the law of Missouri, had no right to bring or maintain this action. On August 26, 1935, the original complaint was amended by leave of court by striking out the words "Administratrix of the estate" in the title of said cause and in the commencement of said complaint and substituting in lieu thereof the words "surviving widow" and by striking out that portion of the complaint which referred to the granting of letters of administration to Margaret Bodine and the tender of those letters as evidence of her right to sue. As amended the complaint also alleged that the defendant is a resident of Stark County, Illinois, has no property in Missouri, that service of process cannot be had upon him in that state and under the laws of that state, no substituted service is provided for a nonresident defendant and concludes that therefore the plaintiff cannot maintain her action there. Thereafter and on May 16, 1936, the amended complaint was dismissed on motion of the defendant and the plaintiff, electing to abide by her complaint as amended, judgment

with the operation of m tor v wills in that the operation of m breach thereof and alleged that the this and lightliftes of the perties, pleintiff and defendant, one governed and controled by the laws of the State of Missouri. The complish that all general the plaintiff's intestate left bim surrivin larreret Podine, bir le . but no minor children, and evers that the Pararet Bodine has, by the death of soid intestate, sufferal accountagalors and dama a under the laws and statutes of the trice of the number and as equition of bring this action and have the sale bonefill or the every give recovered, and tenders nor Lowtern of their ister if or is any or the County Court of Stark County, Lilinoit, as evidence of her commit sue. On Dotober 15, 1934, the defendant filed his answer a te complaint in wich, among wher things, as averred that the opining, under the law of Missart, had no right to bring or maintain this action. On August 26, 1935, the original down with was mended by leave of court by striking out the words "Administratural of the estate" in the title of said course and in the commences nt of said complaint and substituting in lieu thereof the words "surviving vidow" and by striking out that portion of the cornisint the ch referred to the granting of letters of administration to there it Sodine and the tender of those letter: .s ord. ness of here'd te sue. As emended the completent slace elleged in a she defleten i s resident of Stark County, Illinois, has no arepared in it ward, the service of process cannot be ind and another in the and rate the laws of that state, no substituted lervice i. covided for unit resident defendant and concludes and therefore the plain int and mintain ber setion there. Therearther at a for 6, 19.5, mended complete was dismissed at the feet to

plaintiff, electing to obide by ar son with as them.

was rendered in favor of the defendant and against the plaintiff in bar of the action and for costs. It is from this judgment that an appeal has been prosecuted to this court.

The statutes of Missouri effective at the time Joseph C. Bodine died authorized Margaret C. Bodine, his surviving widow, to sue for and recover damages for his wrongful death at any time within one year after his death. In the event the deceased left a minor child or children, then such an action might have been brought after the expiration of one year by the administrator of the deceased. (Secs. 4217-8 and 5426 Rev. Stat. of Missouri, 1919.) The complaint as amended averred that Joseph C. Bodine died on January 31, 1984. as a result of an accident which occurred in Missouri, and that he left no minor child or children him surviving. Therefore, under the law of the state where the death occurred, a right of action accrued to Margaret C. Bodine, surviving widow of the deceased and the time fixed during which such an action could be brought was, in the language of the decisions, a condition of liability and operated as a limitation of liability itself. The original action was instituted by Margaret Bodine, administratrix of the sstate of Joseph C. Bodine, deceased, on August 9, 1934, but under the Missouri law, no cause of action accrued to the administratrix and therefore the original complaint stated no cause of action. Under the allegations of the emended complaint the surviving widow's cause of action accrued on January 31, 1934, and expired one year later. Almost seven months thereafter, to be exact on August 26, 1935, the amendment to the complaint was filed and for the first time stated a cause of action.

This was too late as the action was barred and appellee's conditional

rendered in favor of the defundant and grant that claiminf it of the action and for cests. It is alread both judymen, who amend has been prosecuted to this court.

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liability had terminated. Day v. Talcott, 361 Ill. 437: Smith v. Ill. Power Co., 279 Ill. App. 505: Kesslick v. Williams Oil-O-Matic Heating Corp., 277 Ill. App. 263: Friend v. Alton Railroad Co.; 283 Ill. App. 366. See also Ill. Law Review, Vol. 31, No. 3, Nov. 1936 issue. Carlin V. Peerless Gas Light Co., 283 Ill. 142: Bishop v. Chicago Ry. Co., 303 Ill. 273.

Counsel for appellant recognize the force of the foregoing authorities, and concede that the Missouri courts have likewise construed its statutes, but insist that the original complaint stated a good cause of action by Margaret Bodine under the Missouri statute, that the amendment of August 26, 1935, did not state a new cause of action, nor did it substitute Margaret Bodine, as widow, for Margaret Bodine, administratrix of the estate of Joseph C. Bodine, deceased, out simply struck from the allegations of the original complaint the erminology, which counsel insist has been held to be mere surplusage and in this connection call our attention particularly to Barnes v. for thern Trust Co., 169 Ill. 112: Higgins v. Halligan, 46 Ill. 173. n Higgins v. Halligan, supra, we note that the court uses this anguage referring to the declaration in that case in which the laintiff was referred to as executrix; "describing herself as xecutrix, if the count was not on a liability to her as such, is eresurplusage." In Barnes v. Northern Trust Co., supra, the court efines surplusage as comprehending whatever may be stricken from the ecord without destroying the right of action, or the charge on the ne hand, or the defense on the other. In the instant case if the laintiff in the original complaint was Margaret Bodine, administrarix of Joseph C. Bodine and by the amendment she, as surviving widow f Joseph C. Bodine, was substituted as plaintiff, appellee's deferses hat no cause of action ever accrued to the administratrix and that he cause of action to the widow had expired by limitation were both estroyed.

1. Power Co., 279 Ltl. App. 505: Keshlick v. illiams vi - v-watio ating Corp., 277 Ltl. App. 265: Friend v. itton mailrad Cc.; 3 Ltl. App. 366. See also all. Law waview, Val. 31, No. ., Nov. 36 issue. Carlin V. Peerless Gas Light Co., 285 Lll. 142: bishop

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lowhere states that the action is brought by the plaintiff in her epresentative capacity and call our attention to that portion of the riginal complaint which avers that the deceased left him surviving largaret Bodine, his widow, but no minor children, and that said largaret Bodine has, by the death of said intestate, suffered pecuniary oss and damage under the laws and statutes of the state of Missouri nd is entitled to bring this action and have the sole benefit of hatever may be recovered in this auit. The complaint, however, must e construed as a whole and in the same paragraph where the foregoing ppears and as a part of the same sentence the pleader continues: and the plaintiff brings herewith her letters of administration ranted to her by the County Court of Stark County in the State of 11inois, as evidence of her right to sue." Furthermore, the original omplaint is captioned or entitled: "Margaret Bodine, Administratrix f the estate of Joseph C. Bodine, deceased, plaintiff". The first aragraph of the original complaint begins: "The plaintiff, Margaret odine; administratrix of the estate of Joseph C. Bodine, deceased, omplains of the defendant Harry W. Lloyd and says". Numerous refernces are also made in the original complaint to plaintiff's intestate, nd it is clear to us that the plaintiff therein was the administrarix of Joseph C. Bodine and not his widow and was so intended by the leader. She was suing as administratrix and the complaint was based pon an alleged liability to her as such, and while Margaret Bodine as both the widow and administratrix, her legal entity as administrarix is distinguishable from her legal entity as surviving widow. Counsel for appellant further argue that the statute of the

Counsel for appellant further argue that the original complaint

Counsel for appellant further argue that the statute of the tate of Missouri made no provision for a cause of action to be rought by an administratrix where it appeared that there were no nor children, that the amendment struck certain surplus phraseology

ears and as a part of the same sor tonce the continues nottercaintube to erect a red diversed against filintals and ited to her by the County Court of Stark Sounds in the Stave of nois, as evidence of her right to sue. " Purt errore, the or giral daint is captioned r ortitled: Pargeret Doddae, Wari i trathix he estate of Joneph O. Roding, decheased, initialist The Mark graph of the original complete, see "the plaintiff, . corount ne, administratrix of the detate of Fosepa . odine, d :ce.eu, dains of the defendant Marry 1. Lloys and con ". " unercut Parry s are also made in the original corposint to all initial a lare case, it is clear to us that the pla etiff wherein di one cariff. of Joseph G. modine and not his fact that so interest and der. The was sing on administr to a sed to morelain, or a an alleged liability we her a con , one will the contract both the widow and administratific, as so of a fit, so su · C. EV is distinguished from her become the Counsel for any furth furth on a company of leading e of its . uri made to covision from the constant en a la company de la company obildren, that the amendment even is service and in the tendent

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is was made only for the purpose of clarifying the statement of the iginal cause of action and that nothing material was added by the ditional paragraph which averred that appellant could not maintain raction in Missouri because at the time the amendment was made, pellee was a resident of stark County, Illinois, has no property the State of Missouri, that no personal service could be had upon a there and under the laws of that state no substituted service is evided for a non-resident defendant.

The cause of action which appellant sought to avail herself of s created by the Statute of Missouri and not the Injuries Act the State of Illinois. Under our decisions prior to 1903, our irts refused to take jurisdiction of a cause of action which sought recover damages for a death by wrongful act, which occurred cutle this state, except in those cases where comity had enabled our irts to entertain such suits. Wall v. Chesapeake and Ohio R. R. ., 290 III. 227, The legislature amended our Injuries Act in 1905 deprived our courts of assuming jurisdiction in any case where th arose outside Illinois. Dougherty v. American McKenna Process ., 255 Ill. 369. Our Injuries Act was further amended in 1935 by this amendment which became effective July 1 of that year it s provided: "no action shall be brought or prosecuted in this ite to recover damages for a death occurring outside of this te where a right of action for such death exists under the laws the place where such death occurred and service of process in h suit may be had upon defendant in such place." It was by virtue this amendment that appellant sought to enforce her cause of action ch arose by virtue of the provisions of the Missouri Statute in courts of this state. Under the provisions of the Missouri tute, assuming that the original complaint stated a cause of action nal cause of action and that nothin sateric resided by the sional paragraph which averred thas a mellant sould not animal cotion in Missouri because at the time the areas ent was made, lee was a resident of aterk County, illiancia, as no around the area of Missouri, that no personal satisfactor could be and about there and under the laws of that state no satisficated that are set of or a son-resident darks.

The cause of action which appallant south to a twall normal to.

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to State of Illinois. Under our decisions offer so store wells to take jurisdiction of a cause of soulor wilder against the second demages for a denta by wrongled act, so occurred outthis state, except in shore eases white combits in one or arr
this state, except in shore eases white combits in one or arr
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290 III. 227, The legislature anaded our injected Act in 990
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arrose outside Illinois. Despicative, and committee the second action of the second actio

to recover demages for a decim occurring of a le of vais andere a right of action for such weath exists with a last a place where such rest; courred and a construction of adaptation of all as an income that appeal land so that

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erose by virtue of the provisions in the following sourts of this sitts. Under the grown the following was this sitts assuming we thin order the following was the following source of the following s

favor of Margaret Bodine, as surviving widow, still her right to according to the allegations of the original complaint terminated January, 1935, and at that time the amendment of 1935 had not bee effective and the Circuit Court of Stark County was without juristion to entertain appellant's suft until the amendment to the uries Act did become effective, which was July 1, 1935. Counsel appellant argue, however, that the final judgment in this cause entered on May 26, 1936, and at that time the 1935 amendment was force, that this amendment related to procedure or remedy only and at that time, the public policy of this state, as declared by that adment, authorized appellant to meintain her cause of action in the cuit Court of Stark County, the question presented by the motion to miss was not a question of jurisdiction and the trial court erred in ding that it was and in rendering judgment against appellant. In the view we have taken of appellant's original complaint, is not necessary for us to pass upon this question. What we hold that the original complaint did not state a cause of action under provisions of the statute of Missouri, that a cause of action stated for the first time by the amendment filed August 26, 1935, the cause of action at that time was barred by the provisions of

JUDGMENT AFFIRMED.

affirmed.

Missouri Statute and irrespective of the construction which might placed upon the amendment to the Injuries Act of 1935, the trial of properly sustained appellee's motion to dismiss and properly leved the judgment appelled from and that judgment will therefore

vor of Margeret Lo in , as surviving 160%, will her right to coording to the allegations of the crucinal coording to the allegations of the crucinal coordinate teminated nuary, 1935, and at that time the anadment of 1835 had not besided tive and the Circuit Court of Stark Sounty was without jurison to extertain annellast's suft until the amendment to the less Act did become effective, which was buy 1, 1935. Council populant argue, however, that the first high at the council that the smendment relative that the council that the smendment relative to roce ure or now was in the red

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In the view we have taken of specification or its location is consistent to the firms.

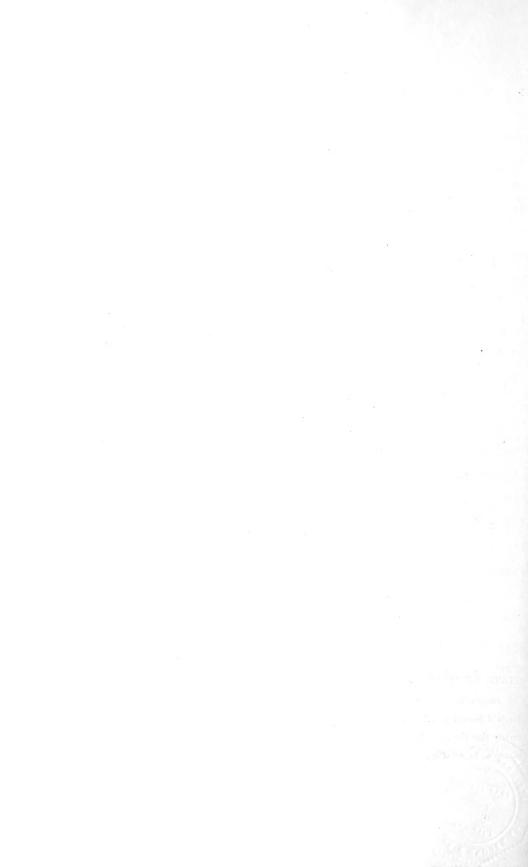
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| STATE OF ILLINOIS, | |
| SECOND DISTRICT | Ss. I. JUSTUS L. JOHNSON, Clerk of the Appellate Court. in and |
| for said Second District of the | he State of Illinois, and the keeper of the Records and Scal thereof, do hereby |
| certify that the foregoing is a | true copy of the opinion of the said Appellate Court in the above entitled cause. |
| of record in my office. | |
| | In Testimony Whereof, I hereunto set my hand and affix the seal of said |
| | Appellate Court, at Ottawa, thisday of |
| | in the year of our Lord one thousand nine |
| | hundred and thirty |
| | · |
| | Clerk of the Appellate Court |

(73815—5M—3-32) -----7



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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in the year of our Lord one thousand nine hundred and thirty-six, within and for the Second District of the State of Illinois:

Present -- the Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice 287 I.A. 6364
JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

EE IT REMEMBERED, that afterwards, to-wit: On NOV 30 1936 — the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT.

JUNE TERM, A. D. 1934.

F. W. MASKE,

Plaintiff (Respondent.)

VS.

LEWIS KOCK, JESSIE KOCH, J. MANLEY
CLARK, Trustee, BRIDGET ROCHE, ROSA
WAGNER, F. H. ALTEMEIR, Receiver of
Pearl City State Bank, ORIE W. DOW,
Trustee, and "UNKNOWN OWNERS",
Defendants (Respondents.)

Appeal from the Circuit Court of Stephenson County.

Wolfe J.

The statement of the case by the petitioner, with the exception of a slight correction, as suggested by the appellee, is conceded to be correct and is as follows: "On March 2, 1925, at Freeport, Illinois, Lewis Koch and Jessie Koch, his wife, being indebted to the First National Bank of Freeport, Illinois, in the principal sum of \$9,000.00, made, executed and endorsed six certain promissory notes, three in the principal sum of \$1,000.00, each, and three in the principal sum of \$2,000.00 each, and all payable to the order of "Themselves" five years after date, together with interest at the rate of $5\frac{1}{2}\%$ per annum. In order to secure the notes the same parties simultaneously executed their deed of trust, which was duly recorded, conveying certain premises in Stephenson County, Illinois, to J. Manley Clark, Trustee.

Some time after the execution of the notes and trust deed the respondents (plaintiffs) purchased five of the notes

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LEVIE 1993, JE SIM NOGH, J. SAMI Y OLAAK, Trustee, BRIDG-11 OST 1, LED WAGNYR, F. H. ALTMALIR, Hecsiver of Fearl Gity State bank, DAIN 1. 5. 7. Trustee, and "UMAND WOLAWAR (Respondents.

Wolfe J.

The Statement of the esse by the petitioner, it, the exception of a slight correct we, as suggested by the a sile, is conceded to be correct and in a rollows: "On wroh?, 988, at Freeport, Illinia, Lewis Mook and selaie Moch, Livelfe, being indebted to the First Lational make of record of record, in the princial amo of record, name of records and six certain promiscory notes, three in all writeins of and three in the six of th

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for value but without endorsement or written assignment from the First National Bank of Freeport, Illinois. The sixth note in the amount of \$2,000.00 was retained by the latter bank and later came into the possession of the petitioner upon his appointment as receiver of the bank by the Comptroller of the Currency on October 9, 1933.

All of the notes matured on March 2, 1930, but the holders continued to accept interest at the rate of 5% per annum, although the notes specified a higher rate, until March 2, 1933. No interest having been paid from the latter date, on March 13, 1934, the respondent (plaintiff), F. W. Maske, filed his complaint in chancery, later joined in by the other plaintiffs, in the Circuit Court of Stephenson County, Illinois, to foreclose the said trust deed. The complaint prayed for a decree of sale and for the distribution of the proceeds of sale proportionately amongst the holders of notes except as to the petitioner, Arthur E. Crum, Receiver of The First National Bank of Freeport, Illinois, holder of the said note for \$2,000.00.

To this complaint the petitioner filed his answer, which was later amended, admitting the various allegations upon which the right to foreclose was predicated, but demanding strict proof as to the making of the loan to the mortgagors by The First National Bank of Freeport, Illinois. The amended answer further specifically denied the right of the plaintiffs to priority in the distribution over the petitioner, and denied that the latter's claim should be subordinated to that of the other holders of notes.

The Court after a hearing found for the plaintiffs, entered a decree of foreclosure in substantial conformity with the prayer of the complaint, and ordered, among other things, that the

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the First Battonal Bank of Tree to the serth to
in the amount of 2,000.00 was ret in by the latter to
and later same into the possession of the potitioner usespointment as reserver of the back by the Corpuraller to
Currency on october c. 1953.

All of the notes matured or larch 2, 1950, but the holders continued to accept interest at the rate of 525 per annum, although the notes specified a higher rate, until March 2, 1933. No interest having need poid from the latter date, on March 13, 1934, the respondent (plaintiff), F. . Maske, filed his complaint in chancery, later joined in by the other plaintiffs, in the Circuit Court of Stephenson Outty, Illinois, to foreclose the soid trust deed. The complaint prayed for a decree of sale and for the distribution of the proceeds of sale proportions telly amongst the holders of notes except as to the petitioner, Arthur . Trum, Receiver of The Pirst National Bank of Freeport, Illinois, holder if the said note for \$2,000.00.

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The Court ofter reserved to the decreasing the first terms and decreasing the first terms of the community, but the prayer of the community, but the community, but the community to the community of the communit

Premises should be sold; that out of the proceeds of sale the Master should, after deducting expenses, pay to the noteholders other than the petitioner, Arthur E. Crum, Receiver, their proportionate shares; and that in case the premises should sell for more than sufficient to pay all of said sums then he should apply the balance toward the satisfaction of the amount of \$2,140.56, found due the petitioner.

Pursuant to said decree the Master duly advertised the premises for sale and on July 24, 1934, the premises were sold to the respondents, F. W. Maske, Bridget Roche and Rosa Wagner, for \$8,224.79, which was a sum sufficient to return to said respondents the exact amounts due them after deducting all costs, expenses, commissions, et cetera. The Master later executed his certificate to the purchasers and remered a report of sale and distribution which was eventually filed and approved by the Court May 18, 1935.

The petitioner now seeks an appeal to this Court to review said decree, asking a reversal or modification of the same for the specific errors hereinafter set forth."

This case was submitted to this Court at the June Term,

A. D. 1934, but no opinion had been prepared because a similar

case had been presented to the Supreme Court on a writ of

certiorari. The case is Anna Domeyer et al., appellees vs.

William L. O'Connell, Receiver, et al., appellants, Docket No.

22999, which, at this time has not been reported in the advanced

sheets. The identical question in this case was decided in the

Domeyer case, and the Court in their opinion say: "We are of the

opinion that neither logically nor equitably can it be said that

an assignee who purchases what he must be held to know is but a

Premises should be sold; that we have a sold sold.

Master should, after deducting extending extending other than the petitioner, article and other than the petitioner, and that in one she are sending extending the shares and the sold as sold the balance toward the satisfaction of the rount of pay. I. .56, found due the petitioner.

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certiorari. The case is Armalors, at all, prelices are

William 1. Nournall, Receiver, at all, and the same as a control of a control of the time has a control of a control of a control of the Grant transfer and the Grant transfer and the Grant transfer are as a control of the control of the control of the court transfer are as a control of the court transfer and the Grant transfer are assigned who murch as a may be as a control of the court transfer and the court are assigned who murch as a may be assigned who murch as a may be assigned who murch as a may be as a control of the court transfer and t

part of the mortggge debt is entitled to have his note paid in full out of an insufficient security merely because of the assignment, without more. The logical and equitable principles which should control in a situation where, as here, all notes mature on the same day, bring us to the conviction that assignees and the mortgagee should share pro rata in the proceeds of insufficient security."

The Judgment of the Circuit Court of Stephenson County should be and is hereby reversed and the cause remanded to said Court.

Reversed and Remanded.

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should control in a situation where, where, all notes without on the same day, bring us to the conviction that evolution of the mortgages should share pro ret in the proceeds of insufficient security."

The Judgment of the Circuit tourt of Stephenson curty should be and is hereby reversed and the cause remanded to seid Court.

Reversed and Remarded.

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| STATE OF ILLINOIS, | Ss. |
| SECOND DISTRICT | ss. I. JUSTUS L. JOHNSON. Clerk of the Appellate Court. in and |
| for said Second District of | the State of Illinois, and the keeper of the Records and Seal thereof, do hereby |
| | a true copy of the opinion of the said Appellate Court in the above entitled cause. |
| of record in my office. | |
| | In Testimony Whercof, I hereunto set my hand and affix the seal of said |
| | Appellate Court, at Ottawa. thisday of |
| | in the year of our Lord one thousand nine |
| | hundred and thirty |
| | Clerk of the Appellate Court |

(73815—5M—3-32) -7



STATE OF ILLEDIS
APPELLATE COURT
FOURTH DISTRICT

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Term No. 9

May Term A. D. 1456

Agenda 13

Jennie Reed,
Administratrix of the Estate
of Lincoln Reed, Deceased.
Plaintiff, Appellant

VG.

Gecil Bergin, Defendant, Appellee Appeal from the Circuit Court of Fayette County.

207 I.A. 6365

L. E. Stone, Presiding Judge

For something more than a year prior to September 17, 1935, Lincoln Reed and Cecil Bergin had been engaged as partners in a grocery and meat business in Vandalia, Illinois under the firm name of Reed and Bergin. On that date, Lincoln Reed died intestate. Bergin as surviving partner proceeded, as was his obligation, under the statute to wind up the partnership business. He prepared an inventory of the partnership property and had said property appraised by appraisers duly appointed by the County Court. By said inventory and appraisement was found that the assets of said Estate assumted to \$3,238.79 while the indebtedness of said Estate assumted to \$3,238.79 while the indebtedness of said firm was \$5,497.86, leaving a deficit of \$2,259.07.

Later. Plaintiff appellant was appointed administratrix of the Estate of Lincoln Reed and on September 36, 1935 filed in the County Court of Fayette County, where said estate was being administered, her petition asking that Bergin, the surviving partner, might be allowed to take over the interest of her intestate's estate in the partnership estate with the understanding that Bergin, the surviving partner, should assume the obligations of the partnership estate. A hearing on said petition was had in the County Court, and said petition was allowed.



In Movember of the same year Appellant filed in the County Court another petition in which she asked said court to vacate and set aside the order on the former petition by virtue of which she had been allowed to turn over her integtate's share in the partnership property to Bergin the surviving partner. In this petition. Plaintiff Appellant alleged that she had been defrauded by Defendant Appellee and procured to make an unfair and disadvantageous settlement with him. Acts of misrepresentation were charged by her against one of the Attorneys for Appellee in that he misinformed her as to the true condition of the partnership estate and that he induced her to act to her detriment at a time when she was mentally disturbed by bereavement and incapable of understanding the condition of afairs before her; she further charged as specific acts of fraud that the condition of the partnership estate as shown by the inventory and appraisement bill. and the list of indebtedness was false and untrue and that said instruments did not honestly reflect the condition of the partnership estate, whereas she was made to believe that they did.

On hearing in the County Court this petition was denied.

An appeal was taken to the Circuit Court where said petition was again denied. Plaintiff Appellant brings the record here on appeal.

partner is required to make a true and perfect inventory of all the partnership assets and to cause to be made a fair and just appraisement of all such property. It is also incumbent upon interested parties to point out to the court by objections any inaccuracies in said instruments. Had Plaintiff Appellant filed her objections to these instruments, we doubt not that the court would have required Defendant Appellee to correct any errors that appeared had there been such. This she did not do, but relies for relief solely upon her aforesaid petition.

Fraud is never presumed but requires the strictest proof.

American Haist. etc. Co. vs. Hall 208 Ill. 597; Kennedy vs.

Kennedy 194 Ill. 346; Mortimer vs. McCullen 202 Ill. 413;

Fraud cannot be established by a pleading, however extravagant its statements may be.



An examination of the evidence in this case shows that the inventory and appraisement of the partnership property were made in the usual and customary way. The appraisement was made by appraisers in whom appellant apparently had confidence. It is quite probable that slight discrepancies crept into the appraisement and inventory as is likely to happen in taking an invoice of a stock of merchandise. But if all such were taken as true in this case it would still leave the estate of Plaintiff's intestate such indebted to the partnership when the indebtedness of said partnership is placed over against the assets. If this is true, how could the estate of Plaintiff's intestate be injured? Far from showing that Plaintiff Appellant was defrauded this record shows that she was benefitted by the course that was taken.

This record involves questions of fact which have been considered by two courts, before both arriving at the same conclusion. We find no warrant for disturbing those conclusions.

The judgment of the Circuit Court is affirmed.

Judgment Affirmed.

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IN THE

APPELLATE GURT OF ILLINOIS

FOURTH DISTRICT

Lenn most

MAY TERM A. D. 1936.

287 I.A. 637

JOHN KASSLY and VICTORIA BARTON, (John Kassly, Appellee),

vs

METROPOLITAN LIFE INSURANCE COMPANY,

Appellant.

Appeal from the City Court of the City of East St. Louis.

STONE, P.A.,

This is a suit brought by John Kassly, appellee, and Victoria Barton, against appellant, Metropolitan Life Insurance Company, in the City Court of East St. Louis. Claim of appellee is for the recovery of \$733.00 funeral expenses incurred in the burial of Alex W.Dimond. The claim of Victoria Barton is not involved in this appeal.

Paragraph 1 of count 1 alleges that Alex W. Dimond died on April 14, 1935, in the City of East St. Louis; that his relatives applied to appellee, then engaged in the general undertaking business, for the burial of the deceased, and informed appellee that appellant was indebted or had money in its hands by virtue of a certain life insurance policy No. 116687969 issued by appellant, insuring the life of Alex W.Dimond.

Paragraph 2 alleges that before appellee rendered any services, appellant, through its general manager of its East St. Louis branch, ordered appellee to proceed with the burial, to make funeral arrangements and promised to pay appellee promptly, on demand, for his services, goods and merchandise furnished not exceeding the face amount of

T { 7 7 K Ki. 108 15 E the insurance policy, which amounted to about \$1,500.00.

Paragraph 3 alleges that relying solely upon the promise of appellant, as set out in paragraph 2, appelled proceeded to advance and did advance his services and furnished all the necessary goods, merchandise and equipment for the funeral and burial of deceased, and, in all respects performed his side of the agreement, and that his claim amounts to \$733.00.

Paragraph 4 alleges that appellant, through often requested, has not paid the same, and demands judgment against appellant in the sum of \$733.00 and interest.

A copy of the policy involved was filed by the plaintiffs in the suit by order of the Court. The policy is what is commonly called an industrial policy. It was issued by appellant to A. White Dimond on January 1, 1934. The amount of the insurance is \$740.00 with the provision that double such amount xhuntaixh would be paid in case death is caused by external, violent and accidental means, etc., and provides for payment upon receipt of proofs of death, etc., to the executor or administrator of the insured unless payment be made under the provisions of the next succeeding paragraph. This paragraph provides, in substance, that appellant may make any payment to the insured's husband or wife, or any relative by blood or connection by marriage of the insured, or to any other person appearing to appellant to be equitably entitled to the same by reason of having incurred expense on behalf of the insured, or for his or her burial, and that the production of a receipt signed by either of said persons at shall be conclusive evidence that all claims under the policy have been satisfied.

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The policy further provides it constitutes
the entire agreement between appellant and the insured,
and the holder or owner thereof; that its terms cannot
be changed or its conditions varied except by the express
agreement of appellant, evidenced by the signature of its
president or secretary; that agents, including managers
and assistant managers, are not authorized and have no
power to make, alter or discharge contracts.

April 14,,1935. The answer states that appellant has no knowledge as to whether or not the relatives of Alex W. Dimond applied to appellee for the burial of his body, or whether or not said relatives informed appellee that appellant was indebted or had money in its hands by virtue of the life insurance policy mentioned.

The answer denies that before appellee rendered any service towards the burial, or at any other time, appellant ordered appellee to proceed with the burial or to make funeral arrangements or promised to pay appellee promotly on demand or otherwise for his services, goods, merchandise, etc.

The answer denies that appellee, relying upon the alleged promise of appellant, proceeded to advance and did advance his services and furnish the necessary goods, merchandise, etc., for the funeral and burial of the deceased.

The issue, therefore, was whether or not appellant ordered appellee to make funeral arrangements for and bury alex W.Dimond, and promised to pay appellee for his services, goods, merchandise, etc., furnished.

Alex W. Dimond was killed April 14,,1935, in an

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automobile accident with a train. His widow was hadly hurt in the same accident. The widow could not look after the funeral arrangements because of her injuries. Victoria Barton, a sister of the deceased, and R. F. Reader, a friend of the deceased, called on Wm. T. Sheehy, the manager of the branch office of appellant in East St. Louis, with reference to the funeral expenses before the funeral. Mrs. Barton says that they told Mr. Sheehy that Mr. Kassly would like to have some assurance the bills would be paid out of the insurance, and that Mr. Sheehy replied not to worry about it, it would be taken care of out of the insurance. She also says they told Mr. Sheehy they came to have him talk to Mr. Kassly and to assure him of the payment of the undertaker's bill, so the body could be taken care of, and that Mr. Sheehy said Mr. Kassly need not worry, it would be taken care of out of the insurance.

Mr. Reader's says that Mrs. Barton and he selected the casket, clothing, etc., and that they wanted to know if it was going to be paid for out of the insurance, and they told Mr. Sheehy their purpose; that Mr. Sheehy said that everything would be all right; that Mr. Sheehy said that everything was all right, everything would be taken care of, the bill would be a lien against the policy.

Otho Jackson, an employe of appellee, says that Mr. Sheehy called appellee's office before the funeral, asked for appellee and then stated to him: "This is Mr. Sheehy of the Metropolitan Life Insurance Company. You tell Mr. Kassly everything is all right; plenty of insurance down here to take care of an ordinary case. Go ahead with the funeral."

J . C = n3, '-* * * 1 . 1 -- 1 . . . - - Tan . b. :01/98 1 1167 - 11 To - - ** [ness** Appellee says that M_T. Sheehy told him before the funeral that the funderal expenses would be taken eare of through the policy carried on M_T. Dimond's life. He said he believed he gave M_T. Sheehy a bill or gave him the amount of the funeral bill after the funeral, and that M_T. Sheehy assured him that the expense would be paid, but he (Sheehy) said the bill was a little too high. He also said that M_T. Sheehy did not tell him in so many words that appellant would pay him; that he took it for granted that the bill would be paid by appellant.

Appellant objected to each of these conversations with Mr. Sheehy on the ground that appellant would not be bound by any statement Mr. Sheehy would make.

Mrs. Sheehy testiried that he never told either Mrs. Barton or Mr. Reader or Mr. Kassly that appellant would pay the funeral bill.

Clayton LaBlantz, a brother-in-law of the widow, testified that appellee talked to him about this funeral bill two or three different times at his home after the funeral; that in none of these conversations did he claim that appellant was to pay the bill, but he was wanting Mr. Black, the widow's father, to pay the bill.

The widow was paid the full amount of the policy, including the accidental death benefit.

Mr. Sheehy testified that his office is in the Murphy Building in East St. Louis; that he had been manager of the branch office of appellant in East St. Louis since 1920; that he was head of the office; that he had four assistant managers and thirty-one agents under him; that he made recommendations as to the clerks who worked in the office to the company, and that the company approves or

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rejects; that appellant is at No. 1 Madison avenue, .y; that the territory over which he has jurisdiction is East St. Louis, Columbia, Waterloo and Milstadt, in the State of Illinois; that it is the only territory with which he has anything to do; that he was not an officer nor a director of appellant. He testified that his duties in general were looking after or recommending ment men to the company for agents and supervising the collecting of premiums; that the men under him solicited insurance, and he supervises them: that he transmits the premiums collected every week to appelant: that he did not have any power and never at any time did have power to adjust or settle claims against appellant; that all such matters are submitted to the company for their decision; that he mer at any time had any power or authority to determine to whom the proceeds of an industrial policy should be paid, or any part of it; that those matters are adjusted by the company; that he never at any time made a determination as to whom any portion of the proceeds of an industrial policy should be paid; that he did not have the power to do so; that those matters are determined by the claim division in New York, and if a technical case it is determined by the home office in New York. That he just sends in the facts and they make the decisions.

Appellee testified, over appellmt's objection, that about a year and a half prior to Mr.Dimond's death Joseph Duimovich, who had an industrial policy with appellant, died, and that appellee was raid by appellant \$454.75, and that Mr. Sheehy delivered the check to him.

A jury was waived and the cause was tried before the Court. Appellant submitted one proposition of law which was refused by the Court. The Court decided appellee's

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claim in favor of appellee and rendered judgment in favor of appellee and against appellant in the sum of \$733.00 and costs on that claim. The court decided Victoria Barton's claim in favor of appellant and rendered judgment in favor of appellant and against Victoria Barton in bar of her claim.

Though the date of payment is not disclosed, it was obviously after the acceptance of the assignment of the policy and after the conversation which Appellee claims as the basis of the contract between the parties. The evidence discloses facts sufficient to amount to a contract between the parties. In other words, appellee has proven his case by a preponderance of the evidence, assuming that the witness Sheehy had authority to bind appellant to the agreement he made with appellee. So that it appears that the question before the Court is, Did Sheehy, as general manager of appellant have authority to bind his principal to the said agreement.

The policy provides that its terms cannot be changed or its conditions varied except by the express agreement of appellant, evidenced by the signature of its president or secretary; that agents, including managers and assistant managers are not authorized and have no power to make, alter or discharge contracts.

The authorities cited by appellant do not seem to us to be decicive of the greek issue here, granting that they do recite the existing law of the state when applied to facts such as they recite, and other parallel states of fact. Sheehy was a general agent for a large territory. He held himself out to the world as one

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possessing authority appellant to act in the capacity in which he did act in this case. Office was given to his authority so to act so far as appellee was concerned. He had transacted a similar business with thesaid agent before and his act had been ratified by appellant.

Appellee's warrant to act under the agreement with appellant's general agent Sheehy seems to us to have been sufficient.

where a private corporation allows its managing officer so to conduct himself in his dealings on behalf of the company as to lead the public and those dealing with him reasonably to believe that he possesses certain powers, the company will not be allowed to question such apparent power or authority as against one relying in good fath faith on the same. McDonald vs Chisholm, 131 Ill. 273.

When an act pertaining to the business of a corporation which is not foreign to the mx corporate powers, is done by an officer within his department it will be presumed to have been done with the consent of the corporation. Bank of Minneapolist vs Giffin, 168 III 314.

A principal may be bound we to the extent of the apparent authority which he has conferred upon his agent. This is upon the theory that the principal causes others to believe the powers of the agent to be greater than those actually conferred. Merchants' National Bank vs Hart, 223 Ill. 41-50.

The acts which amounted to such representation in this case were known to appellee. He had so dealt with the same agent before.

We are of the opinion that the transaction

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carried on between the parties under the facts and circumstances, has the indicia of implied authority in appellant's agent Sheehy to act for his principal in the matter in hand, and that appellant cannot now repudiate that authority.

As to the claim of Victoria Barton, we think the court ruled correctly. Whatever the significance of the assignment of the policy, it was not made for the use and benefit of Victoria Barton, but to insure the payment of Appellee's claim.

The Judgment of the City Court is affirmed.

JUDGMENT AFFIRMED.

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STATE OF ILLINOIS,
APPELLATE COURT,
FOURTH DISTRICT.

Agenda 19.
May Term. 1936.

Eru Wolf

ert Sansewicz,

Appellee,

VS.

eorge Petroff, Appellant.

y the court without a jury.

Writ of Error to Circuit Court of Franklin County.

287 I.A. 6372

DWARDS, J.

Appellee sued for and recovered in the Circuit Court of Franklin punty a judgment for \$817.50 for damages to certain chattels belonging to ppellee, which were injured in transit from Johnson City to Pontiac, by a pollision between the truck driven by a servant of appellant and one operated by Ben Avery-which contained the goods of appellee. The cause was heard

Appellant contends chiefly that Avery was the servant of appellee t the time of the accident, and that he was then guilty of negligence which roximately contributed to cause the injury and damage.

Appellee's position was that he had engaged one Ray Beaver to ransport the chattels, and that Beaver had employed Avery to assist him the work; that Beaver was an independent contractor; that Avery was his ervant and that appellee had no control over the latter, and hence was not pund by nor answerable for his negligence, if he was guilty of such.

The complaint filed by appellee avers that at the time of the coident, appellee, "by his then agents and servants in that behalf, was

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hauling along said highway" etc. The amended complaint alleges that "on said day plaintiff, by his then agents and servants in that behalf, in a certain automobile truck, was transporting," etc., the goods in question.

Appellee, having grounded his cause of action upon the proposition that at the time of the injury he was, by his agents and servants, transporting the chattels along and over the highway, could not, without first amending his pleadings, make proof of, nor recover, upon the theory that the carriage of the goods was in the charge and control of an independent contractor. To do so would be to permit a recovery upon a ground other and different from that charged in the complaint and its amendments, which cannot be done. Hamilton Co. v. Channell Chemical Co., 327 Ill., 362; Feder v. Widland Casualty Co., 316 Ill., 552. The record does not present for consideration, upon review, the question of independent contractor.

Upon the proposition of whether the driver of appellant failed to exercise ordinary care to avert the accident, and if so, whether it was the proximate cause of the same, and also "hether the servant of appellee was guilty of negligence which proximately contributed to the occurrence which resulted in the damages to appellee's chattels, same were questions of fact to be determined by the trial judge, whose finding should have the same weight as the verdict of a jury. Katzoff v. Goodman, 197 Ill. App., 488; Rosenfeld v. Ehrhart, 202 Ill. App., 617; Illinois-Indiana Fair Assn. v. Phillips, 241 Ill. App., 454.

A court, sitting as a jury, has the same opportunity of determining the credibility of witnesses, and deciding where lies the preponderance of the evidence, and its finding in that regard will not be set aside upon review unless it is manifestly against the weight of the evidence. Broderick 7.0° Leary, 112 Ill. App., 658; Rademacher v. Greenwood, 114 Ill. App., 543.

The proof bearing upon the questions of fact was conflicting,

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where it was the province of the court to determine the truth. We cannot by that the holdings were unsupported by the evidence, and our duty in such use is to not interfere with the finding. Tarjan v. Regelin, 202 Ill. App., O; Davis v. Smith, 132 Ill. App., 589.

Judgment affirmed.

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APPILLATE COJIT OF ILLIAOID. FOOLTH BLOTLICE

Helen Kuntz.

Appellee.

VS.

John Heneock Sutual Life Insurance Comosmy.

appellant.

appeal from the City Court or the oit, of hest St. Louis.

I.A. 63 aganda 10

Tur by J.

Fru Will

Helen Wuntz, appelled, reserved to herein as pleintiff, brought this action is beneficiary in eight insurance policies issued by the defendant, insuring the life of august Flatz, hasbend of the pipiatiff. After the issuance of the several policies the defendent issued som accident certificate which is substance provided that if the insured sistained boully injury solely through external, violent that residental easts occurring after the date thereof and resulting in the death of the insured within 90 ages from the care of such inpury, and while the policies were in fall force the actionismt weals, is constitut to the other sums aut, pay a same that to the ince : would be insertable that a in the policy. The face of each of the policies visitation by this action plaintiff seems to recover the suditional incorrace provided for under the accident cortilieste.

A trial with a jury resulted in a versict and juggent for the plaintiff for \$2740 the fall amount claime .

As grands in reversel actem at arges that the court erred in overruling its motions for a directed versieb and a new trial.

The evidence shots that on April 1., ly. o the in tree suffered certain scalus and burns on his well are, her and the left side of his abusen. No question is raised but what such injuries ; ere accidental but defendant contends that plaintiff



has not proven that these injuries caused the death of the the insured. The injuries were of such a nature that he did not return to his employment for some time and was under the care of a doctor. Dr. Knight gave him medical attention the first week after the injury and Dr. Godirey, a physcian furnished by his employer, gave him medical care from April 20 to May 28. On the latter date the doctor discharged him as cured and he returned to his employment June 4th. He worked that day and part of June 5th when he became ill and he returned to his homse. Dr Knight was again called and cared for him until his death June 8th.

There is evidence which tends to prove that at the time the insured returned to his employment there were an unhealed place on his arm and several smaller unhealed places on his left thigh which were not bandaged.

Dr. Knight testified that when he was called in last illness, there were unhealed places on his left leg and shoulder that he had a cold or influenza which later developed into pneumonia and he gave it as his opinion that the burns had weakened his physical condition thereby making him subject to pneumonia.

Dr. Godfrey testified that the burns had healed when he last saw him on May 28th and that as early as May 20th the insured was physically able to work. He gave it as his opinion that the injuries did not cause the pneumonia and that they had no connection therewith.

Upon a motion for a directed vertict the sole question for the trial court to determine is whether there is any evidence, which assuming it to be true, which proves or tends to prove the material elements of plaintiff's case. If there is the motion should be overruled. The court properly overruled the motion for a directed verdict.

Defendant further contends that the versict is against the mannifest weight of the evidence.

Praintiff testified that on June 4th the dry insured returned to work, he had open sores on his left arm which were bandaged, that there were several small unhealed places on his left thigh which were not behaved, that on June 5th he came



home from work about three P. M., that he was ill and went to bed remaining there until his death June 8th, that Dr. Knight was called June 6th to attend him.

Dr. Knight testified for plaintiff and was uncertain as to dates of treatments but was sure he attended incured in his last illness, he described the open sores caused by the burns and gave it as his opinion that the pneumonia was crused from the weakened condition created by the injuries. We quote a part of his testimony as follows: "Pneumonia usually starts from exposure of some kind, usually from getting wet. He did get wet when he got his burns. The radiator exploded, threw steam, and that was the way I connected the cause of his pneumonia with the burn. My opinion is that the death of August Kuntz was caused from his pneumonia, contracted from his exposure and the burns." He also testified that in the first death certificate he gave the cause of death as chromic mycarditis brought on by acute alcoholism but that he had now changed his mind as to the cause of death. On cross elamination he admitted that plaintiff had repeatedly urged him to change his mind as to this material point and that he fingling consented to it.

Gordon Hathway an insurance solicitor for another company testifying for the defendant stated that he solicited insured for insurance the week preceding May 5th 1930 and that insured then signed an application for insurance in thich he had said he was in sound health, that no physcian had sold him to take treatments and that he had not suffered from any unsease or ailments.

Dr. Godfrey testified that the burns were cared on May 28th when he discharged him as cared and gave it as his opinion that the burns could not have caused or contributed to the death of insured.

william Accols a fellow employee of insured testified as to how the accident happened on April loth, that the reason he quit his employment June 5th was lack of work to co; that he

knew of insured using intoxicating liquor, that he always had a bottle and drank at home and when at work, that he called to see him in his last illness and saw him drink liquor on at least two of these visits.

The testimony of R. L. McAdoo a fellow employee corroborated Accola as to the insured's habit of drinking intoxicating liquor and the reason for his guiting work on June 5th.

This is all the evidence that bears upon the cause of death. We are satisfied that there would be sufficient evidence to support a finding that the burns of the insured had not fully healed when he returned to work but there is no evidence that the burns caused plaintiff to become weakened physically. Nor is there any evidence describing the extent of the barns or the pains suffered or any other facts from which it could be reasonably inferred that such injuries would result in a weakened physical condition. Dr. Kaight in giving his reasons upon which he based his opinion stated that gneamonia usually starts from exposure of some kind, usually from getting wet and then concludes that the insured became held from the steam that caused the burns. It is undisputed that the accident occurred April 16th and that pneumonia did not develop until June oth. Without the development of a weakened physical condition or some other condition connected with the burns it is improbable that pneumonia would follow after such a lapse of time. Dr Kni, ht has on other occasions made statements as to the cause or menth which conflicts with his evidence in this case. Without the opinion evidence of Dr. Knight there is nothing to support the lineing that the accidental injuries caused or contributed to his ceath.

We are impelled to hold that the praintiff has not established her case and that the verdict is against the mannifest weight of the evidence.

It is the settled law of this state that if the verdict is mannifestly against the weight of the evidence it is the duty of the trial court to set it saide and grant a new trial and a failure to do so is error for which a judgment must be reversed.



Donelson v East St. Louis Ry. Co., 205 Ill. 625; Belden, v Innis, 84 Ill. 78.

The records shows that this case has been twice tried resulting each time in a verdict for the plaintiff and we have given full credit to that fact but after a consideration of all the evidence we are constrained to hold this verdict is against the weight of the evidence and that the judgment should be reversed.

Judgment of the circuit court reversed and the cause remanded.

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APPILLATI CLURT
OFILLIBLIST
FOURTE DISTRICA.

John M. Karns, Administrator of the Estate of Carol E. Graves, Deceased,

Plaintiff-Appellee

vs.

The Frudential Insurance

. Company of America Defendant-Appellant.

St. Clair County, Hllinois.

Appeal from the

287 I.A. 63

Circuit Court of

Eurphy J.

Plaintiff, appellee instituted this suit against defendant appellant in justice court to recover on an industrial insurance policy issued by defendant appellant insuring the life of Carol E. Graves, plaintiff appellee's intestate. On appeal to circuit court the case was tried before the court without a jury and resulted in a judgment for plaintiff and this appeal is from that judgment.

That policy was issued in Rovember 1920 with a face value of \$400. The premiumrate was 25 cents per week. In 1929 the policy lapsed but was reinstated by the giving of a note for \$7.75 the amount of the delinquent payments. By the terms of the policy and the note the amount was a lien against the policy and was so endorsed on the policy. Rovember 10 1930 the policy again lapsed for non-payment of premiums and no payments were ande after said date. The insured died Rovember 4, 1932.

The policy among other provisions contained the following: "If this Policy lapse for non-payment of premium after premiums have been duly paid for three full years or more, the Insured, without any action upon his or her part, will become entitled to non-participating Extended Insurance



for the respective term specified in the following table. The amount of insurance payable if death occur within said term shall be the same amount as that which would have been payable if this Policy had been continued in force, except as to dividend additions subsequent to the date of lapse.

If there be any indebteaness under this Policy, such indebtness will be deducted from the the Cash surrender Value, or the term of the Extended Insurance or the emount of the Paid-up Life Policy will be reduced to such term or amount as the net single premium value of the respective provision reduced by such indebtedness shall provide according to the mortality table hereinsfter specified."

The schedule for extended insurance as incorporated in the policy provided that if the preliums had been paid four full years the policy without action by the insured would be carried for the face of the smount for two years and forty one weeks. There were other options but insured did not exercise any of them.

The trial court held that the policy was good as extended insurence for two years and forty one weeks and insured having died within that period the four huncred doulars was due the beneficiary less the amount of the note for §7.75.

In this the court ignored the policy provision that if there was any indebtness the term of the extended insurance would be reduced from that set forth in the ochedule in the policy to such term as the net single presime value of the policy reduced by the indebtness would provide according to the mortality table specified in the policy. The evidence shows that on the date the policy lapsed the value for extended insurance was \$13.15. Deducting the debt of \$7.75 from such value and there was, on the date of the lapse of the policy \$5.58 to pay for extended insurance. The evidence farther shows that \$5.38 would at age of insured purchase extended insurance for the face of the policy of for a period of approximately sixty weeks. Insured lived for a longer period than sixty weeks following the lapse of the policy and therefore



the extended insurance had expired prior to her death.

The judgment of the Circuit Court is reversed

Not to Dr Published in July



INTH APPELLATE COORT. OFILLINOIS

FOULTH DISTRICT

Frances Sursa

VS.

City of Centralia, a Municipal Corporation, Appellant.

Murphy J.

Appeal from the Circuit Court of Marion County.

287 I.A. 638

20.

Appellee instituted this suit against appellant to recover damages for personal injuries alleged to have been sustained when she fell on a sidewalk in said city.

The complaint contains two counts, the first charges general negligence in permiting the sidewalk at the place of the accident to become and remain cracked, broken, aneven and unstable, the second count is substantially the same as the first with the additional allegation that at the time and place of the accident the sidewalk had an unusual collection of snow and ice thereon which had collected by reason of the defective condition and was thereby made extra-hazardous.

Appellant's answer denied the charges of negligence and a trial with a jury resulted in a verdict and judgment for appellee for four handred dollars.

The only grounds relied upon for a reversal are that the verdict is not supported by a preponderance of the evidence and is against the law.

The accident occured about 10 m.M. Lecember 34, 1954. I thad been raining and sleeting and there was a heavy coating of ice on the walks. The accident, on the west side of Chestnut Street in said city. The walk was made of limestone slabs and at the place of the accident the west naif of the walk was a pair of street doors which opened to an entrance into the basement of an adjoining building. The limestone slab opposite these doors is where the accident occured. This slab is described as being 4 inches thick, four feet eight inches east and west and four feet



north and south.

Appellee testified that as she approached the scene of the accident she was walking slowly and carefully near the center of the walk and that as she stepped onto the stone above described it gave way and she was thrown on the walk causing the injury.

that at the time of the accident he was operating a tavern near the scene of the accident, that the stone on which she stepped and fell was a little rough and worn, had cracked places in it, that the stone was set on a foundation and was hollow under it, that in the month of August prior to the accident he notified the mayor that this walk was in a defective condition, that he and the mayor inspected it, found a small part of the stone was broken off and when on it, it would go down and that in freezing weather ice and snow accumulated in the depressions on the surface. He did not see appellee fall but saw her lying on the sleb described and assisted her to the ambulance.

Harry Trainor, testifying for appelled, stated that the slab was "teetery" that when he stepped on one side it would go down and then step on the other side and it would go up an inch and a half to three inches. That there were broken places all around, the surface sloped toward the center. He also testified as to the general icy condition of the walks on that date.

Irvin Taylor testified that for a year he had observed the walk at this point, that the slab in question moved up and down, that it sloped toward the building, that after it snowed or sleeted the low places on the sarface filled with snow and ice. He corrobated lengthsh on the point that the mayor had inspected the walk in August prior to the accident.

walk for more than three months prior to the accident, that it had low places in the surface, was cracked, that he law appellee fall, that she was moving slowly and carefully.



Holly Stover, street superintendent for appellant, testifying for the city, stated that in July following the accident the surface was covered with a material known as workalite that this was done to bring the surface to an even level that at that time the foundation of the slace were solid. He did not know of the condition of the walk the previous December.

James E. McCielland a city commissioner in1954 testified the slabs were solid.

John Laugenfield who succeeded AcClelland as a city commissioner in May 1955 testified that in May 1955 the stones had become worn and cupped that they used workalite to give it an even surface. Glenn Stover, the foreman in charge of the resurfacing of the walk in 1955, testified the surface was worn and when tested with a straight edge there were two or three inches below the level.

John McNeil, Mayor in 1904 denied having inspected the walk in question in company of Mr. kaglish.

Other witnesses testifying for appellant stated that all the sidewalks in the city were icy and difficult to walk upon at the time of the accident.

Appellee's evidence strongly supports her theory that the slab upon which she stepped had an insufficient foundation that permitted it to rock or move when she stepped upon it. The evidence also shows that where here depressions on the surface which were of sufficient depth and breadth to cause an extra accumulation of water and ice.

Under such evidence it became a question for the jary to determine whether appellee's fall was consett by the moving rocking or testering of the shat, the extra-hazardous condition created by the ice and vater accumulating in the depressions on the surface or whether it was on set as appellant contenes by the general fey condition of the walk.

A city is not and inserer against accidents to



benestrains planeting about ton autum attender . otel of Chicago 340 Ill. 638 Boender v City of Harvey 251 Ill. 228 and is not liable for injuries resulting arom general slipperiness of its streets and sidewalks due to the presence of ice and snow which have accumulated as a result of natural causes and which do not actually obstruct traffic, Graham v City of Chicago supra, but in this case there is sufficient evidence to support appellue's contention that the slab on which she stepped, moved or "teetered". thereby causing her to lose her balance and throwing her to the ground. Such condition if believed by the jury would have been sufficient in itself to have caused appellee to fall even when no ice or sleet was present. The jury having found for appellee the court would not be warrented in saying that the ice and sleet caused appellee to fall and that the defective condition of the slab had nothing to do with it.

The evidence supported the verdict and the judgement of the lower court should be affirmed.

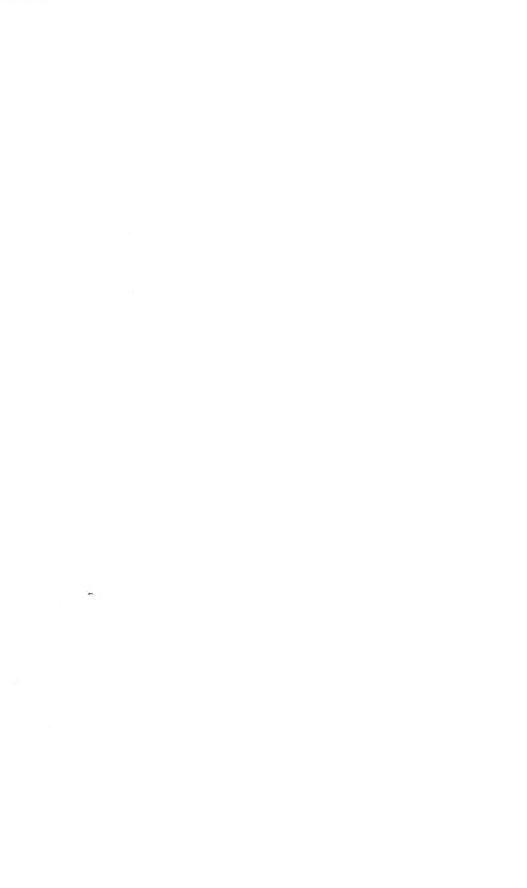
Judgment affirmed.

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